UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 06-2103-bk, 06-2118-bk, 06-2186-bk

Argued: October 22, 2009
Decided: March 22, 2010

In re JOHNS-MANVILLE CORPORATION,

Debtor.

JOHNS-MANVILLE CORPORATION, MANVILLE CORPORATION, MANVILLE INTERNATIONAL CORPORATION, MANVILLE EXPORT CORPORATION, JOHNS-MANVILLE INTERNATIONAL CORPORATION, MANVILLE SALES CORPORATION F/K/A JOHNS-MANVILLE SALES CORPORATION, SUCCESSOR BY MERGER TO MANVILLE BUILDINGS MATERIALS CORPORATION, MANVILLE PRODUCTS CORPORATION AND MANVILLE SERVICE CORPORATION, MANVILLE INTERNATIONAL CANADA, INC., MANVILLE CANADA, INC., MANVILLE INVESTMENT CORPORATION, MANVILLE PROPERTIES CORPORATION, ALLAN-DEANE CORPORATION, KEN-CARYL RANCH CORPORATION, JOHNS-MANVILLE IDAHO INC., MANVILLE CANADA SERVICE INC., and SUNBELT CONTRACTORS INC.,

Debtors,

TRAVELERS CASUALTY AND SURETY COMPANY, TRAVELERS PROPERTY CASUALTY CORP., TRAVELERS INDEMNITY COMPANY, COMMON LAW SETTLEMENT COUNSEL, STATUTORY SETTLEMENT COUNSEL, and HAWAII SETTLEMENT COUNSEL,

Movants-Appellees,

—v.—

CHUBB INDEMNITY INSURANCE COMPANY, ASBESTOS PERSONAL INJURY PLAINTIFFS, CASCINO ASBESTOS CLAIMANTS, PEARLIE BAILEY, SHIRLEY MELVIN, GENERAL LEE COLE, ROBERT ALVIN GRIFFIN, VERNON WARNELL, and LEE FLETCHER ANTHONY,

*Objectors-Appellants.**

SANDER L. ESSERMAN (Cliff I. Taylor, Stutzman, Bromberg, Esserman & Plifka, PC; Douglas T. Tabachnik, Law Offices of Douglas T. Tabachnik, Manalapan, New Jersey, on the brief), Stutzman, Bromberg, Esserman & Plifka, PC, Dallas, TX, *for Objector-Appellant Asbestos Personal Injury Plaintiffs.*

JACOB C. COHN (William P. Shelley, on the brief), Cozen O'Connor, Philadelphia, PA, *for Objector-Appellant Chubb Indemnity Insurance Company.*

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* The Clerk of the Court is respectfully directed to amend the official captions in these actions to conform to the caption listed above.

JASON R. SEARCY (Joshua P. Searcy, on the brief), Jason R. Searcy, P.C., Longview, TX, *for Objector-Appellant Cascino Asbestos Claimants.*

BARRY R. OSTRAGER (Andrew T. Frankel, Robert J. Pfister, on the brief), Simpson Thatcher & Bartlett, LLP, New York, NY, *for Movants-Appellees Travelers Casualty and Surety Company, Travelers Property Casualty Corp., and Travelers Indemnity Company.*

RONALD BARLIANT (Kenneth S. Ulrich, Kathryn A. Pamenter, Goldberg, Kohn, Bell, Black, Rosenbloom & Moritz, Ltd.; Karen A. Giannelli, Gibbons, Del Deo, Dolan, Griffinger & Vecchione, PC, Newark, NJ, on the brief), Goldberg, Kohn, Bell, Black, Rosenbloom & Moritz, Ltd., Chicago, IL, *for Movant-Appellee Common Law Settlement Counsel.*

MATTHEW GLUCK (Kent A. Bronson, on the brief), Milberg Weiss Bershad & Schulman, LLP, New York, NY, *for Movants-Appellees Statutory Settlement Counsel and Hawaii Settlement Counsel.*

Before: CALABRESI and WESLEY, *Circuit Judges.***

** The Honorable Sonia Sotomayor, originally a member of the panel, was elevated to the Supreme Court on August 8, 2009. The two remaining members of the panel, who are in agreement, have determined the matter. *See* 28 U.S.C. § 46(d); 2d Cir. Local Rules, Internal Operating Procedure E; *see also United States v. Desimone*, 140 F.3d 457, 458-59 (2d Cir.1998).

PER CURIAM:

For almost 30 years, the Johns-Manville Corporation ("Manville") and its insurers have sought to navigate the monumental liability arising out of its production of a once-valued substance-asbestos. These appeals are yet another judicial stop on that long journey.

The matter is before us on remand from the Supreme Court of the United States, which determined that the bankruptcy court's 1986 orders in Manville's Chapter 11 proceedings—"whether or not proper exercises of bankruptcy court jurisdiction and power"—are not subject to collateral attack by either the parties to the 1986 proceedings or those in privity with them. *Travelers Indem. Co. v. Bailey*, __ U.S. __, 129 S.Ct. 2195, 2205, 2207, 174 L.Ed.2d 99 (2009). The Court directed us to address the parties' remaining, properly preserved arguments. *See id.* at 2207. As the *Bailey* Court suggested, the primary current contention is the argument of Chubb Indemnity Insurance Company ("Chubb") that "it was not given constitutionally sufficient notice of the 1986 Orders, so that due process absolves it from following them, whatever their scope." *Id.* In our view, Chubb is correct.

Every court that has played a role in this case has acknowledged that the magnitude and complexity of the underlying bankruptcy proceedings are unparalleled. Insofar as the law of bankruptcy is concerned, the Manville Chapter 11 reorganization has few, if any, peers. The remaining issues in this case, however, implicate bedrock concepts of due process of law. Applying these principles, we conclude that Chubb was not

afforded constitutionally sufficient notice of the proceedings that led to the entry of the 1986 orders by the bankruptcy court. As such, Chubb is not bound by the bankruptcy court's 2004 interpretation of those orders. Accordingly, the district court's order is reversed as to Chubb, and the case is remanded for further proceedings.

I. BACKGROUND

A. Facts

The immediate object of this appeal is a March 28, 2006 order of the United States District Court for the Southern District of New York (Koeltl, J.), which affirmed in part and vacated in part two August 17, 2004 orders from the United States Bankruptcy Court for the Southern District of New York (Lifland, J.). The due process issues that we must resolve, however, require us to revisit the nascent stages of Manville's Chapter 11 proceedings in the early 1980s.

1. Manville's Chapter 11 Petition

"From the 1920s to the 1970s, Manville was, by most accounts, the largest supplier of raw asbestos and manufacturer of asbestos-containing products in the United States, and for much of that time Travelers was Manville's primary liability insurer." *Bailey*, 129 S.Ct. at 2198 (internal citation omitted).[1] When the health

[1] We use the term "Travelers" to refer to Travelers Casualty and Surety Company, Travelers Property Casualty Corporation, and Travelers Indemnity Company, as well as

effects resulting from exposure to the substance became a matter of public knowledge, Manville was "crushed by the weight of [its] century-long entanglement with asbestos," and it filed a voluntary Chapter 11 petition in the Southern District of New York on August 26, 1982. *In re Johns-Manville Corp.* ("*Manville I*"), Nos. 82 B. 11656 *et al.*, 2004 WL 1876046, at *14 ¶52 (S.D.N.Y.Bankr.Aug. 17, 2004), *aff'd in part and vacated in part by In re Johns-Manville Corp.* ("*Manville II*"), 340 B.R. 49 (S.D.N.Y.2006). Soon after the petition was filed, the bankruptcy court recognized "that Manville's insurance policies were the bankruptcy estate's most valuable asset." *In re Johns-Manville Corp.* ("*Manville III*"), 517 F.3d 52, 56 (2d Cir.2008). The value of those policies was uncertain, however, because they were the subject of a series of "contentious, costly and time-consuming coverage dispute[s]" between Manville and a number of asbestos-industry insurers in the California Superior Court. *Manville I*, 2004 WL 1876046, at *14 ¶54. The insurers' ability to honor the Manville policies, whether at full value or not, was also complicated by potential liability arising out of other asbestos litigation in which they were involved. *Id.* ¶¶54-57.

Between October 1983 and July 1984, in order "[t]o avoid the uncertainty of the insurance litigation and to fund its plan of reorganization, Manville sought to settle its insurance [coverage] claims." *Manville III*, 517 F.3d at 56. The result of these negotiations, which were admirably

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their respective affiliates, predecessors, successors, assigns, officers, and directors. *See Manville III*, 517 F.3d at 55 n. 3.

facilitated by the bankruptcy court, was a settlement that ultimately yielded over $850 million paid by the insurers to the Manville estate. *Id.* at 56 & n. 8.

On May 25, 1984, Manville publicly announced that it had agreed in principle to a settlement of its insurance coverage disputes. Soon after the announcement, Manville and a group of insurers-Travelers among them-executed a settlement agreement (the "1984 Insurance Settlement Agreement").

> The settlement[ ] provided that, in exchange for cash payments [into a settlement fund], the insurers would be relieved of all obligations related to the disputed policies and the insurers would be protected from claims based on such obligations by injunctive orders of the Bankruptcy Court.

MacArthur Co. v. Johns-Manville Corp., 837 F.2d 89, 90 (2d Cir.1988).

More specifically, the 1984 Insurance Settlement Agreement contained three parts. First, the Settling Insurers agreed that, if Manville voluntarily withdrew its claims in the insurance coverage disputes, they would make a series of payments into the Manville Personal Injury Settlement Trust ("Manville Trust"). *Manville III*, 517 F.3d at 57.[2] Travelers paid $80 million into

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[2] Chubb was not a party to the 1984 Insurance Settlement Agreement. Rather, the "Settling Insurers" were "The Travelers Indemnity Company on behalf of itself and each of its Affiliates, The Home Insurance Company on behalf of itself and each of its Affiliates and each Lloyd's Syndicate and British Company."

the Manville Trust pursuant to the agreement. *Id.* Second, the agreement required that the order confirming Manville's Chapter 11 reorganization would contain an injunction that: (1) channeled "solely" to the Manville Trust all "Policy Claims," which the agreement defined as "any and all claims . . . by any Person . . . based upon, arising out of or related to any or all of the Policies" at issue in the settlement;[3] and (2) barred "Policy Claims against any or all members of the Settling Insurer Group." Third, in order to resolve the asbestos-related claims that were to be channeled to the Manville Trust, the parties to the settlement agreed that compensation from the Manville Trust would only be available to claimants that executed "broad releases" of liability as to the Settling Insurers relating to "any and all claims . . . whether or not presently known . . . based upon, arising out of or related to the Policies."[4]

On August 2, 1984, Manville sought the bankruptcy court's preliminary approval of the 1984 Insurance Settlement Agreement. Manville's submission stated that:

> The parties to the Agreement will request this Court to order that[,] because these

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[3] The full definition of "Policy Claims" in the 1984 Insurance Settlement Agreement was identical to the definition of that term in the orders that were ultimately entered by the bankruptcy court.

[4] The administrators of the Manville Trust have used at least three different versions of this release, but the language relating to its scope has not been revised in a material fashion. *See Manville I*, 2004 WL 1876046, at *16-17 ¶¶ 67-68 & n. 5.

> [insurance] policies constitute property of the [Manville] estate under Section 541 of the [Bankruptcy] Code . . . , the property be liquidated by this settlement, and that all claims by any person to the *res* be channeled to that liquidated fund, and that all persons be enjoined from suing the Settling Insurers because the property of the estate has been liquidated and will be in possession of the Court.

In a separate "Application" that was simultaneously submitted to the bankruptcy court, Manville proposed "notice and service procedures with respect to the Insurance Settlement Agreement and the hearing to be held by [the bankruptcy court] to consider the fairness and approval thereof." The Application proposed that notice of the settlement and hearing be provided by mail to several groups of "interested" parties, as well as by publication in approximately 91 newspapers throughout the United States and Canada. Manville indicated that the "supplemental" publication notice was appropriate "because of the 'channeling' mechanism and injunctive relief required by the proposed Insurance Settlement Agreement and the effect thereof on those who might assert an interest in the insurance policies and the Debtors' claims against the Settling [Insurers]."

In response to Manville's request, also on August 2, 1984, the bankruptcy court issued a "Notice of Hearing to Consider Approval of Compromise and Settlement of Insurance Litigation." The Notice stated:

> The proposed Insurance Settlement Agreement provides [that] . . . [a]n order of the Bankruptcy Court shall be obtained providing that all persons shall be restrained and enjoined from commencing and/or continuing any suit, arbitration or other proceeding of any type or nature for any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be asserted by any person against any and all the Settling [Insurers] based upon, arising out of or relating to any or all of the insurance policies. . . .

On August 14, 1984, shortly after beginning the approval process for the 1984 Insurance Settlement Agreement, the bankruptcy court appointed a Future Claims Representative ("FCR") to represent future asbestos claimants whose interest in the Manville Chapter 11 proceedings might vest after the settlement was approved and Manville's reorganization plan was confirmed. The bankruptcy court defined the class of "Future Claimants" as "those persons who have been exposed to asbestos or asbestos products mined, manufactured or supplied by Manville pre-petition and have manifested or will manifest disease post-petition and who are not otherwise represented in these proceedings." The court then appointed the FCR, "*nunc pro tunc* as of August 1, 1984," to represent the Future Claimants by "exercis[ing] the powers and perform[ing] the duties of a Committee under Section 1103 of the Bankruptcy Code."

Following the bankruptcy court's approval of notice procedures and the appointment of an FCR, it conducted settlement-approval proceedings on an ongoing basis between 1984 and 1986. After receiving notice, several parties objected to the settlement. In one pertinent example, the "Committee of Asbestos-Related Litigants and/or Creditors" challenged the definition of "Policy Claims" in the 1984 Insurance Settlement Agreement:

> The [Settling] Insurers' breach of covenants of good faith and fair dealing and consumer protection statutes (*e.g.*, Calif. Insur. Code § 790.09(h)) clearly arise out of or relate to the Policies [at issue in the Settlement]
>
> . . .
>
> But these claims are not direct actions for proceeds; they are *independent* third party claims against the [Settling] Insurers which are not derivative of Manville's rights. The [Manville] Estate never has, or can ever have, any right in these claim proceeds, for they are not contractual-they are personal rights which the victims have for the tortious conduct of the [Settling] Insurers.

(Reply Memorandum of the Asbestos Committee Opposing the Proposed Insurance Settlement Agreement on Legal Grounds, at 8-9 (May 13, 1985) (emphasis in original).) In support of this contention, the Committee asserted that "[i]t is well-established that the [Bankruptcy] Court has no jurisdiction . . . to grant the discharge of and injunction against these independent, non-

derivative claims, as the [1984 Insurance Settlement] Agreement requires." (*Id.* at 10.)

In response to these and other objections to the settlement, the parties executed a letter agreement on June 3, 1985, which indicated that it was to operate as an amendment to the 1984 Insurance Settlement Agreement. One portion of the letter agreement stated:

> The Court has *in rem* jurisdiction over the Policies and thus the power to enter appropriate orders to protect that jurisdiction. The channeling order is intended *only* to channel claims against the *res* [of the Manville estate] to the Settlement Fund and the injunction is intended *only* to restrain claims against the *res* (*i.e.*, the Policies) which are or may be asserted against the Settling Insurers.

(emphasis added). The letters were executed by Travelers' counsel and indicated that "[t]he foregoing is confirmed on behalf of the Travelers Indemnity Company . . . and each of its Affiliates."

After conducting periodic hearings and conferences throughout 1984 and 1985, the bankruptcy court entered an order on September 26, 1985 that "approved pursuant to Rule 9019 of the Rules of Bankruptcy Procedure" the 1984 Insurance Settlement Agreement "together with" the June 3, 1985 letter agreement. The order conditioned the final approval of the settlement on "the result of a hearing" that would resolve, *inter alia*, whether the "amounts paid in settlement fall within the range of reasonableness."

2. The Confirmation of the Manville Reorganization Plan and Approval of the 1984 Insurance Settlement Agreement

In August 1986, the bankruptcy court entered an order setting the procedures that would be followed to confirm the Manville Plan. The order directed Manville to provide notice of the confirmation proceedings pursuant to an August 22, 1986 "Plan of Notification" of the confirmation proceedings, which included a series of newspaper and television advertisements and a direct mailing to interested parties. The ongoing evidentiary hearing relating to the 1984 Insurance Settlement Agreement was concluded on November 19, 1986. Several parties filed additional objections to the Manville Plan itself, and the bankruptcy court conducted the last hearing relating to the Manville Plan on December 16, 1986. Two days later, on December 18, the bankruptcy court granted final approval to the 1984 Insurance Settlement Agreement (the "Insurance Settlement Order"), and it entered an order confirming the Manville Plan on December 22 (the "Confirmation Order," collectively, with the Insurance Settlement Order, the "1986 Orders").

The Insurance Settlement Order contained a series of provisions that were required by the terms of the 1984 Insurance Settlement Agreement in order to: (1) enjoin "Policy Claims" against Travelers and the other Settling Insurers; and (2) "channel" asbestos claimants with Policy Claims to the settlement proceeds housed in the Manville Trust. *See generally Manville I,*

2004 WL 1876046, at *15 ¶61. The term "Policy Claims" was defined in the Order as

> any and all claims . . . (whether or not presently known) which have been, or could have been, or might be, asserted by any Person against any or all members of [Manville] or against any or all members of the Settling Insurer Group based upon, arising out of or relating to any or all of the Policies.

A "channeling injunction" directed that Policy Claims were to be "transferred, and shall attach, solely" to the Manville Trust. The Insurance Settlement Order also provided the Settling Insurers with a release from all "duties or obligations based upon, arising out of or related to the Policies and . . . from any and all Policy Claims." Finally, the Order contained a permanent injunction that prohibited "all Persons . . . from commencing and/or continuing any suit . . . of any type or nature for Policy Claims against any or all members of the Settling Insurer Group."

The Confirmation Order incorporated by reference the Insurance Settlement Order, and this Court rejected challenges to both of the 1986 Orders on direct appeal in *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 94 (2d Cir.1988). Congress subsequently used the bankruptcy court's orders as a model to add a provision relating to channeling injunctions to the Bankruptcy Code. *See Manville III*, 517 F.3d at 61 (citing 11 U.S.C. § 524(g)). As of 2004, the Manville Trust had paid more than $3.2 billion to over 606,000 asbestos claimants. *See Bailey*, 129 S.Ct. at 2199.

3. The "Direct Actions"

Long after the 1986 Orders were entered by the bankruptcy court, asbestos claimants began to file claims against Travelers and other insurers in several states across the country. "Because many of the suits at issue [sought] to hold Travelers liable for independent wrongdoing rather than for a legal wrong by Manville, they [were] not direct actions in the terms of strict usage." *Bailey*, 129 S.Ct. at 2200 n. 2. Nevertheless, we again use the phrase "Direct Actions," for purposes of simplicity, to describe these claims. *See Manville III*, 517 F.3d at 55 n. 4.[5] Viewed broadly, they came in two flavors: (1) "Statutory Direct Actions" based on states' statutory regulation of insurance practices; and (2) "Common Law Direct Actions," in which it was alleged that Travelers and others violated "duties to disclose certain asbestos-related information [that they] learned" as asbestos-industry insurers. *Id.* at 58.

In 2002, relying on the terms of the 1986 Orders, Travelers sought an injunction from the bankruptcy court against several then-pending Direct Actions.[6] The court issued a temporary

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[5] The claims brought pursuant to Louisiana's direct action statute, La.Rev.Stat. 22:1269 (2009), are the only true direct actions resolved by the 2004 Direct Action Settlement. *See Manville III*, 517 F.3d at 62-63 (citing *In re Davis*, 730 F.2d 176 (5th Cir.1984) (per curiam)). There is no dispute that these actions are enjoined by the 1986 Orders.

[6] Travelers' initial motion for a preliminary injunction related to Direct Actions in the state courts of Louisiana, Massachusetts, Texas, and West Virginia. In 2003, Travelers filed two similar motions for injunctions of Direct Actions in Texas and Ohio. *See Manville III*, 517 F.3d at 58 & n. 11.

restraining order and referred the matter to mediation before Mario Cuomo, former governor of New York. *Id.* The mediation ultimately allowed Travelers to reach a tripartite settlement—the "2004 Direct Action Settlement" —involving three categories of Direct Actions: the Common Law Direct Actions, the Statutory Direct Actions, and another set of Statutory Direct Actions separately referred to as the Hawaii Direct Actions.

In November 2003, as part of the resolution of the Statutory Direct Actions, Travelers agreed to pay up to $360 million into a fund that would be used to compensate claimants with those sorts of claims. *Manville I*, 2004 WL 1876046, at *22 ¶ 96. In May 2004, Travelers agreed to create a similar $70 million fund for present and future claimants in Common Law Direct Actions, as well as a $15 million fund for the plaintiffs in the Hawaii Direct Actions. *Id.* at *22-23 ¶¶ 101, 105. In order to gain access to the funds established by Travelers, which are separate from the Manville Trust created pursuant to the 1984 Insurance Settlement Agreement, the 2004 Direct Action Settlement required that claimants release Travelers from further liability "separate and apart from Travelers' protection under the 1986 Orders." *Bailey*, 129 S.Ct. at 2200. The Settlement was also conditioned upon the entry of a "Clarifying Order" by the bankruptcy court. The contemplated order was to state, in essence, that the Direct Actions "are, and have always been, prohibited by the 1986 [O]rders." *Manville III*, 517 F.3d at 58.

Travelers filed a motion seeking the bankruptcy court's approval of the Common Law Direct Action settlement in March 2004, and then sought approval of the latter two agreements in June of the same year. The bankruptcy court approved an extensive set of party-driven notice procedures, and conducted hearings on July 6 and August 17, 2004 to resolve objections to the settlement.

Among the objectors was Chubb, an asbestos-industry insurer that was one of Travelers' co-defendants in the Common Law Direct Actions but not a party to the 1984 Insurance Settlement Agreement. Through its objections, Chubb sought to preserve its ability to bring claims against Travelers for contribution and indemnity relating to their potential joint liability in the Common Law Direct Actions. *See Manville I*, 2004 WL 1876046, at *33 ¶ 33; *see also Manville III*, 517 F.3d at 60 n. 17. Chubb contended that the bankruptcy court lacked authority to enjoin it from doing so, and presented two principal arguments in support of its position. First, Chubb joined an argument presented by certain individual asbestos claimants that the bankruptcy court lacked subject matter jurisdiction to enjoin non-derivative claims against Travelers, a third-party non-debtor, in Manville's Chapter 11 proceedings. Second, Chubb asserted that Travelers was seeking injunctive relief that could not "constitutionally be applied" to it because, in the 1980s, Chubb "was in the position of a potential future claimant with no knowledge of its potential future claims [against Travelers] and for

which no future claims representative . . . was appointed to protect its rights."

On August 17, 2004, the bankruptcy court issued "Findings of Fact and Conclusions of Law" in which it rejected, *inter alia,* Chubb's two-pronged challenge to the 2004 Direct Action Settlement. On the same day, the bankruptcy court entered the "Clarifying Order" that was contemplated by settlement (collectively, with the bankruptcy court's "Findings of Fact and Conclusions of Law," the "2004 Orders").

The 2004 Orders have three primary features that are relevant to these appeals. First, based on its fact finding that "Travelers learned virtually everything it knew about asbestos from its relationship with Manville," the bankruptcy court "clarifie[d]" that all of the Direct Actions "are within the scope of the [1986 Orders'] prohibitions, and are—and always have been—permanently barred." *Manville I,* 2004 WL 1876046, at *30 ¶ 19. Second, the bankruptcy court rejected Chubb's arguments that it was "unauthorized to bar the contribution or indemnity claims [Chubb] may have against Travelers." *Id.* at *33 ¶ 33. It reasoned that those claims, too, were barred by the 1986 Orders, and that a "Judgment Reduction Provision" in the 2004 Orders "protects the interests of non-settling defendants in the direct action claims so completely as to render their objections to the settlements moot." *Id.* at *34 ¶ 38; *see also id.* at *33-34 ¶¶ 34-35.[7] Finally, in

[7] The Judgment Reduction Provision states that:

> Any judgment obtained against . . . any objecting insurer [*e.g.*, Chubb] . . . regardless of whether such Insurer was a settling Manville insurer [in 1986], with

response to claims by what it deemed "creative plaintiffs," the bankruptcy court approved a "Gate-keeping" Provision that "vest[ed] the initial determination regarding whether an asbestos suit against Travelers will violate the [1986 and 2004] orders" with the bankruptcy court rather than the court in which the claims were filed. *Id.* at *35 ¶¶ 42, 44; *see generally id.* at *34-35 ¶¶ 39-44.

B. Procedural History

Two groups of parties appealed the bankruptcy court's 2004 Orders to the district court: (1) a number of insurers that included Chubb; and (2) asbestos claimants separately referred to as the Asbestos Personal Injury Plaintiffs and the Cascino Asbestos Claimants (collectively, the "Objecting Plaintiffs").[8] *See Manville II*, 340 B.R.

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respect to any claim asserted in any lawsuit that is enjoined as to Travelers and not enjoined as to said Insurer shall be reduced by the greater of: (a) the amount (if any) the Claimant has recovered or is entitled to recover from the [Direct Action Settlement] Fund . . . to the extent that the Insurer is entitled to such a reduction for that amount under the applicable state law; or (b) to the extent permitted under the applicable state law, the amount or percentage (up to 100%) that the Insurer would have been able to recover from Travelers, whether by contribution, indemnity or otherwise under applicable state law, had Travelers been joined in said lawsuit and/or sued for indemnity and/or contribution in a separate lawsuit.

[8] The parties comprising the Asbestos Personal Injury Plaintiffs and the Cascino Asbestos Claimants were discussed in our prior decision, and those terms have the same meaning here. *See Manville III*, 517 F.3d at 55 nn. 1-2. Although the groups filed separate opening briefs prior to

at 55. The district court affirmed the bankruptcy court's 2004 Orders in all respects except as to the Gate-keeping Provision.

The bulk of the district court's decision related to the Objecting Plaintiffs' argument that "the injunction in the [2004] Clarifying Order is broader than the 1986 Orders, and that, even if the 1986 Orders contemplated Direct Action Suits, the Bankruptcy Court had no jurisdiction in 1986 to bar such suits." *Id.* at 59. The district court rejected this contention for three reasons. First, the court agreed with the bankruptcy court that the language of the 1986 Orders barred all of the Direct Actions. *See id.* at 61. Second, emphasizing the bankruptcy court's factual findings relating to Travelers' relationship with Manville and the nature of the Direct Actions, it held that "the Bankruptcy Court had jurisdiction over Travelers' insurance policies, and could act to protect them from dissipation by direct action claims by enjoining those claims and channeling them into the Manville Trust." *Id.* at 63. Third, the district court concluded that it was "unlikely" that the 2004 Orders "impermissibly bar[ ] suits involving Travelers' conduct with respect to insureds other than Manville and asbestos injury completely unrelated to Manville." *Id.* at 65. Based on that reasoning, the district court held that the bankruptcy court had "subject matter

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Manville III, the Cascino Asbestos Claimants declined to file supplemental briefing following the Supreme Court's remand and did not present additional oral argument. Unless otherwise stated, we find the substance of their remaining arguments to be materially indistinguishable from those of the Asbestos Personal Injury Plaintiffs.

jurisdiction to enjoin the Direct Action Suits pursuant to the 1986 Orders and the Clarifying Order." *Id.* at 67.

The district court also rejected Chubb's argument that it could not be bound by the 1986 Orders. *See id.* at 68. The court held that, because Chubb was a "sophisticated insurer with asbestos-related insurance policies," the bankruptcy court's August 2, 1984 Notice relating to the 1984 Insurance Settlement Agreement "should have put Chubb ... on notice with regards to whatever asbestos-related claims it may have against Travelers and the other settling insurers." *Id.*

The district court also rejected Chubb's reliance on *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999). The court reasoned that, "[u]nlike the class action settlements in *Amchem* and *Ortiz*," which involved exercises of *in personam* jurisdiction over asbestos manufacturers, "the injunction here is based on the Bankruptcy Court's *in rem* power over the Manville estate." *Manville II*, 340 B.R. at 68-69. Thus, in the district court's view, "there is an exception to the due process concerns raised by Chubb" because the bankruptcy code creates " 'a special remedial scheme' " that allows for the foreclosure of " 'successive litigation by nonlitigants.' " *Id.* at 68 (quoting *Ortiz*, 527 U.S. at 846, 119 S.Ct. 2295).

The district court reached a different conclusion, however, with respect to the Gate-keeping Provision in the 2004 Orders. The court reasoned

that, while the bankruptcy court possessed contempt authority to sanction litigants that violated the 1986 Orders, it lacked "jurisdiction to screen, in the first instance, suits against a non-debtor that purport to assert claims unrelated to the debtor or the estate." *Id.* at 66.

Following the district court's decision, Chubb, OneBeacon America Insurance Company, Continental Casualty Company,[9] and the Objecting Plaintiffs appealed to this Court.[10] In *Manville III*, we focused on whether the bankruptcy court possessed subject matter jurisdiction "to enjoin the Direct Action Claims against Travelers." *Manville III*, 517 F.3d at 65. In finding that it did not, we reasoned that "clarification cannot be used as a predicate to enjoin claims over which [the bankruptcy court] had no jurisdiction." *Id.* at

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[9] OneBeacon America Insurance Company and Continental Casualty Company withdrew their appeals prior to our decision in *Manville III*. *See* Dkt. Nos. 06-2099-bk, 06-2105-bk.

[10] Travelers also filed an untimely appeal challenging the district court's vacatur of the Gate-keeping Provision. *See* Dkt. No. 06-2320-bk. "Acknowledging its tardiness in filing its notice of cross-appeal, Travelers [also] filed with the District Court a motion to extend by one day the time allotted to file a notice of cross-appeal," pursuant to Federal Rule of Appellate Procedure 4(a)(5)(A). *In re Johns-Manville Corp.*, 476 F.3d 118, 120 (2d Cir.2007). The district court denied Travelers' motion, and Travelers appealed that decision as well. *See* Dkt. No. 06-3317-bk. In a consolidated opinion, we affirmed the district court's denial of Travelers' motion for an extension of time and dismissed as untimely Travelers' cross-appeal. *In re Johns-Manville Corp.*, 476 F.3d at 124. Consequently, the district court's ruling regarding the Gate-keeping Provision is not before us.

61. In light of Travelers' in-court concession that "both the statutory and common law [direct action] claims seek damages . . . that are unrelated to the policy proceeds" that are part of Manville's bankruptcy estate, we criticized the jurisdictional analysis undertaken below for its failure to analyze separately the state-law legal duties that serve as the basis for the various types of Direct Actions. *See id.* at 63, 67 (emphasis omitted). In that regard, we distinguished between true "direct action[s] against an insurer when the insured is insolvent," and claims that "seek to recover directly from the debtor's insurer for the insurer's own independent wrongdoing." *Id.* at 64-65. While we concluded that the 2004 Orders were "on sound jurisdictional ground" to the extent that they "clarified" that the former type of claims was enjoined, *id.* at 64 (citing Louisiana's direct action statute), we held that the bankruptcy court lacked jurisdiction to enjoin claims that "aim to pursue the assets of Travelers" and "make no claim against an asset of the bankruptcy estate." *Id.* at 65; *see also Bailey*, 129 S.Ct. at 2208-09 (Stevens, J., dissenting) ("Recognizing the distinction between insurer actions and independent actions, the Court of Appeals held that the Bankruptcy Court had improperly enjoined the latter in its 2004 order."). In short, we concluded that "a bankruptcy court only has jurisdiction to enjoin third-party non-debtor claims that directly affect the *res* of the bankruptcy estate." *Manville III*, 517 F.3d at 66. As such, we held that the bankruptcy court erred by using the 2004 Orders as a "jurisdictional bootstrap" to enjoin non-derivative claims

against Travelers, a non-debtor, that did not seek to collect from Manville's bankruptcy estate. *Id.* at 68.

The Supreme Court granted certiorari and reversed *Manville III* in *Bailey*. The *Bailey* Court characterized appellants' jurisdictional argument as an impermissible collateral attack, and held that the 1986 Orders mean what they say. The Court reasoned that the Direct Actions—and, presumably, claims by Chubb against Travelers for contribution and indemnity—are "Policy Claims" under the 1986 Orders. *See Bailey*, 129 S.Ct. at 2203. This point was "drive[n] home" by the bankruptcy court's undisputed factual findings relating to the extent of the knowledge that Travelers obtained from Manville during their insurer-insured relationship. *Id.* The Court acknowledged that there are "certainly . . . statements in the record" indicating that "some parties to the Manville bankruptcy (including Travelers) understood the proposed [1986] injunction to bar only claims derivative of Manville's liability," but nevertheless held that the "plain terms" of the 1986 Orders "unambiguously" bar the Direct Actions. *Id.* at 2204. The 1986 Orders, in turn, "became final on direct review over two decades ago" following *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 90 (2d Cir.1988). *Bailey*, 129 S.Ct. at 2203. The Court then held that the bankruptcy court's jurisdiction to enter the 1986 Orders was not subject to collateral attack in these proceedings by parties who were bound by the previous Orders, and that the 2004 Orders were a proper

exercise of the bankruptcy court's authority to interpret the 1986 Orders. *See id.* at 2203.

The Supreme Court characterized *Manville III* as having undertaken a "different jurisdictional inquiry" relating to whether the bankruptcy court "had exceeded its jurisdiction when it issued the orders in 1986." *Id.* at 2205. This, the Court reasoned, was error:

> [O]nce the 1986 Orders became final on direct review (whether or not proper exercises of bankruptcy court jurisdiction and power), they became *res judicata* to the "parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose."

Id. at 2205 (quoting *Nevada v. United States*, 463 U.S. 110, 130, 103 S.Ct. 2906, 77 L.Ed.2d 509 (1983)). The Bailey Court emphasized, however, that its holding was "narrow." *Id.* at 2207. First, "owing to the posture of this litigation," the Court "[did] not resolve whether a bankruptcy court, in 1986 or today, could properly enjoin claims against nondebtor insurers that are not derivative of the debtor's wrongdoing." *Id.* Second, it declined to "decide whether any particular [party] is bound by the 1986 Orders," and instructed us to address Chubb's due process argument and other properly preserved objections raised in these appeals. *Id.*

On remand, we accepted supplemental briefing from the parties and conducted another oral

argument. On October 21, 2009, on the eve of the second argument, the Objecting Plaintiffs voluntarily withdrew their challenges to the portions of the 2004 Direct Action Settlement relating to the Statutory Direct Actions (including the Hawaii Direct Actions). Remaining to be resolved, then, are the preserved objections—including those of Chubb—to the portion of the 2004 Direct Action Settlement relating to the Common Law Direct Actions.

II. DISCUSSION

In an appeal from a district court order affirming a decision of the bankruptcy court, we perform an independent, *de novo* review of the bankruptcy court's conclusions. *E.g., O'Rourke v. United States,* 587 F.3d 537, 540 (2d Cir.2009). The remaining appeals present one primary question: whether it would offend the Due Process Clause to enforce the 1986 Orders against the Objecting Plaintiffs and Chubb. The Objecting Plaintiffs forfeited this argument by failing to raise it in their direct appeals from the district court's decision. Chubb, however, has raised this objection consistently from the outset, and we conclude that it would be inconsistent with fundamental notions of due process to bind Chubb to the 1986 Orders. Accordingly, for the reasons set forth below, we reverse as to Chubb but affirm as to the Objecting Plaintiffs.

A. The Objecting Plaintiffs

The Objecting Plaintiffs argue on remand that they were not adequately represented at the proceedings that led to the entry of the 1986 Orders, and therefore they are not bound by the bankruptcy court's 2004 interpretation of those Orders. This contention has been forfeited, however, because the Objecting Plaintiffs have raised it for the first time after the Supreme Court's remand. *See Sniado v. Bank Austria AG*, 378 F.3d 210, 213 (2d Cir.2004). Generally speaking, of course, this waiver principle is prudential rather than jurisdictional. *Id.* Nevertheless, we lack the authority to reach the merits of this due process question because the Supreme Court instructed us to address only properly preserved arguments on remand. *See Bailey*, 129 S.Ct. at 2207. In other words, the Supreme Court itself decided, in its discretion, that forfeited arguments should not be considered. As a result, because the Objecting Plaintiffs failed to raise this argument in their initial appeals, and because it would be inconsistent with the terms of the Supreme Court's remand instructions to reach it now, we hold that this argument by the Objecting Plaintiffs has been forfeited.

The Asbestos Personal Injury Plaintiffs have preserved a narrower objection couched in terms of due process. In their opening appellate brief, they argued that the bankruptcy court employed an improperly "truncated" approval process in 2004 relating to the Direct Action Settlement, which "[did] not meet due process standards as enunciated by the United States Supreme Court." They further contended that the "expedited

approval" of the 2004 Direct Action Settlement did not "allow[ ] them an opportunity to 'weigh in' on the proposed settlement."

These assertions are meritless. In *MacArthur*, for example, we rejected an argument that due process required that an objector to the 1984 Insurance Settlement Agreement receive notice of the settlement negotiations *before* terms were reached by the parties to the agreement. *See MacArthur*, 837 F.2d at 94. We did so because the appellant was "provided with notice and a hearing before the settlements were approved by the Bankruptcy Court." *Id.* The same is true here. The terms of a settlement regarding the Common Law Direct Actions were reached in May 2004 as a result of the mediation conducted by Governor Cuomo; on June 9, 2004, the bankruptcy court approved extensive notice procedures relating to the settlement-approval process; and the bankruptcy court conducted fairness hearings-at which the Objecting Plaintiffs were represented-on July 6 and August 17, 2004. *See Manville I*, 2004 WL 1876046, at *22 ¶ 101, *24 ¶ 116, *30 ¶ 15. Under these circumstances, we find no basis in the record for the Asbestos Personal Injury Plaintiffs' assertion that the Due Process Clause required more. We therefore reject this narrower due process argument as well, and hold that all of the Objecting Plaintiffs are bound by the bankruptcy court's 2004 interpretation of the 1986 Orders.

B. Chubb

In the proceedings that led to the entry of the 2004 Orders, Chubb objected to the Direct Action

Settlement on the grounds that: (1) the bankruptcy court lacked subject matter jurisdiction to bar its contribution and indemnity claims against Travelers, and (2) it could not, as a matter of due process, be bound to the 1986 Orders' terms. Both the bankruptcy court and the district court rejected these arguments, albeit for different reasons. Chubb raised the same due process contention before this Court in its opening appellate brief, but we did not reach the issue in *Manville III*. *See* 517 F.3d at 60 n. 17. In light of the Bailey Court's remand instructions, we must address this due process question now.

The significance of this issue must be understood in light of the Supreme Court's opinion and our earlier opinion. The Supreme Court did not decide whether the bankruptcy court had jurisdiction to issue the broad orders that it did in 1986. We had held in *Manville III* that the bankruptcy court exceeded its jurisdiction in issuing those orders, at least as those orders were interpreted in the 2004 Orders. But the bankruptcy court's error did not matter as far as the Supreme Court was concerned, because most of the litigants, having failed to raise that claim of error at the time of the 1986 Orders, were, the *Bailey* Court held, barred from raising it later on. The same would be true of Chubb if the 1986 Orders properly bound Chubb. If, instead, the 1986 Orders could not bind Chubb because such a holding would violate due process, then Chubb may challenge the bankruptcy court's jurisdiction. And that challenge would necessarily be successful in our Court, pursuant to our holding in *Manville III*—which the Supreme Court nei-

ther embraced nor assailed that the bankruptcy court exceeded its subject matter jurisdiction in issuing the 1986 Orders (as interpreted).

With that context, we proceed to the question at hand. For the following reasons, we hold that both the bankruptcy court and the district court erred in rejecting Chubb's due process argument. Chubb, therefore, is permitted to challenge the bankruptcy court's jurisdiction to issue the 1986 Orders. And, because we adhere to our holding in *Manville III* that the bankruptcy court exceeded its jurisdiction in 1986, it follows that Chubb is not bound by the terms of the 1986 Orders.

1. The Bankruptcy Court's Ruling in *Manville I*

The bankruptcy court treated Chubb's arguments as a generalized assertion that the court was "unauthorized to bar the contribution or indemnity claims [Chubb] may have against Travelers." *Manville I*, 2004 WL 1876046, at *33 ¶ 33. The court offered two reasons for rejecting Chubb's position. First, it reasoned that the contribution and indemnity claims at issue—like the Direct Actions—were barred by the terms of the 1986 Orders. *See id.* at *33-34 ¶¶ 34-35. Second, the bankruptcy court held that the Judgment Reduction Provision in the 2004 Orders not only "enforces the [1986 Orders] by clarifying that Policy Claims arising from Travelers['] alleged conduct may not be surreptitiously collected by [Direct Action plaintiffs] from other insurers," but also "protects the interests of non-settling defendants in the direct action claims so completely as to render their objections to the set-

tlements moot." *Id.* at *34 ¶¶ 36, 38. We are not persuaded.

With respect to due process, it is of no moment whether the terms of the 1986 Orders have been, in effect, read by the bankruptcy court to bar Chubb's claims. Put differently, the text of the orders that were ultimately entered in 1986 does not speak to whether Chubb was afforded due process during the proceedings that led to the entry of those orders in the first place. In reasoning otherwise, and by grouping together what should have been distinct inquiries regarding subject matter jurisdiction and Chubb's due process rights, the bankruptcy court put the proverbial cart before the horse by assuming that Chubb was bound by the 1986 Orders. The Supreme Court impliedly recognized this by remanding to us the due process question.

Similarly deficient is the bankruptcy court's reference to the Judgment Reduction Provision in the 2004 Orders. This provision neither "completely" protects Chubb's due process rights with respect to the entry of the 1986 Orders, nor renders Chubb's objection "moot." *Id.* at *33 ¶ 38. Relying on the 2004 Judgment Reduction Provision as an enforcement mechanism for the 1986 Orders—like the bankruptcy court's emphasis of the terms of the 1986 Orders—ignores, rather than addresses, Chubb's due process argument. Indeed, the Judgment Reduction Provision is only relevant to the extent that the 1986 Orders actually prohibit Chubb from bringing nonderivative claims against Travelers for contribution and indemnity. Chubb contests this premise; the issue is therefore whether Chubb

may be bound at all by the 1986 Orders, whatever their meaning. With respect to that contention, it is beside the point that the 2004 Orders "enforc[e]" the 1986 Orders, *id.* at *34 ¶ 38, or that the Judgment Reduction Provision may in some circumstances ameliorate Chubb's liability exposure in the Common Law Direct Actions.[11] We therefore hold that the bankruptcy

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[11] Assuming, *arguendo*, that the Judgment Reduction Provision could affect Chubb at all, the bankruptcy court also erred by suggesting that the Provision "completely" protects Chubb's "interests." *Manville I*, 2004 WL 1876046, at *34 ¶ 38. The Provision contemplates two methods of calculating judgment reduction: (1) the *pro tanto* method, *see, e.g., Singer v. Olympia Brewing Co.*, 878 F.2d 596, 600 (2d Cir.1989); and (2) reducing the value of a judgment against a non-settling insurer by the amount of Travelers' proportionate share of liability. The Provision, however, makes the availability of these judgment-reduction methods a function of "applicable state law." Some states permit only *pro tanto* judgment reduction. *See Manville II*, 340 B.R. at 72 (citing West Virginia, Ohio, and Massachusetts as examples). In such states, any judgment against Chubb in a claim enjoined as to Travelers could only be reduced by the amount that the plaintiff was entitled to receive from the settlement funds established by the 2004 Orders, regardless of Travelers' actual proportion of the liability. *See Gerber v. MTC Elec. Techs. Co.*, 329 F.3d 297, 303 (2d Cir.2003); *Singer*, 878 F.2d at 600. As Chubb points out, if the settlement funds are exhausted, then the plaintiff in question would not be entitled to receive any compensation from the 2004 Direct Action Settlement. Under such circumstances, the Judgment Reduction Provision would be virtually meaningless to a non-settling insurer named as a Direct Action defendant in a state where only *pro tanto* judgment reduction is available. *See Manville II*, 340 B.R. at 72. As such, the Provision does not "completely" protect Chubb's financial exposure, much less its due process rights.

court erred by relying on the terms of the 1986 Orders and the 2004 Judgment Reduction Provision to reject Chubb's due process argument.

2. The District Court's Ruling in *Manville II*

Perhaps in recognition of the difficulties with the bankruptcy court's analysis, the district court analyzed Chubb's due process argument independently and rejected it on three grounds. *See Manville II*, 340 B.R. at 68-69. The court's reasoning was based on our prior holding in *MacArthur*, the nature of Chapter 11's "special remedial scheme," *Ortiz*, 527 U.S. at 846, 119 S.Ct. 2295, and the bankruptcy court's August 2, 1984 Notice of Hearing to Consider Approval of Compromise and Settlement of Insurance Litigation. *See Manville II*, 340 B.R. at 68-69. We consider each in turn.

First, *MacArthur* is inapposite. Chubb was not a party to the 1986 proceedings and there is no indication in the record of a privity relationship between Chubb and any of the actual parties.[12]

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[12] Although Travelers' arguments focused on publication notice, it also briefly argued that Chubb had actual notice of the proceedings. In the supplemental brief submitted to this Court following the Supreme Court's remand, Travelers asserted that (1) Pacific Indemnity Company was a wholly owned subsidiary of Chubb that was a party to the insurance coverage disputes in the California state courts, and (2) Chubb received actual notice of the 1986 Orders because the August 2, 1984 Notice document was sent to Pacific Indemnity Company. In an October 26, 2009 post-argument submission, however, Travelers conceded that "[a] direct corporate relationship between [Chubb] and Pacific Indemnity Company . . . may not have existed." Travelers

As a result, Chubb's due process argument cannot be rejected on *res judicata* grounds. *See, e.g.*, *Bailey*, 129 S.Ct. at 2205 (reasoning that a final decision is entitled to *res judicata* effect only as to "the parties and those in privity with them" (internal quotation omitted)); *cf. Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 257 (2d Cir.2001) ("The injunction was part and parcel of the judgment that plaintiffs contend failed to afford them adequate representation. If plaintiffs' inadequate representation allegations prevail, as we so conclude, the judgment, which includes the injunction on which defendants rely, is not binding as to these plaintiffs."), *vacated in part and remanded*, 539 U.S. 111, 112, 123 S.Ct. 2161, 156 L.Ed.2d 106 (2003).

Nor does the "law of the case" doctrine foreclose Chubb's due process argument. This doctrine "directs a court's discretion, it does not limit the tribunal's power." *Arizona v. California*, 460 U.S. 605, 618, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983). Because *MacArthur* is readily distinguishable, it does not affect the result here. In *MacArthur*, the appellant asserted that "it was denied due process of law because it received notice of the insurance settlements only after the settlements had been negotiated." *MacArthur*, 837 F.2d at 94. Here, Chubb asserts that it received *no notice at all* of the 1986 Orders or the pre-confirmation fairness hearings relating to the 1984 Insurance Settlement Agreement. More-

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also failed to provide any legal authority for its position. In light of these concessions, and because we, too, are unaware of any authority supporting Travelers' contention, we reject this actual-notice argument.

over, the party objecting to the settlement in *MacArthur* participated in the proceedings that led to the entry of the 1986 Orders and was well aware of its interest in the matter at that time. In contrast, Travelers forthrightly acknowledged to the bankruptcy court in 2004 that the Direct Actions—and, consequently, Chubb's contribution and indemnity claims—were "unimaginable" at the time the 1986 Orders were entered. Finally, in *MacArthur*, the appellant's "rights as an insured vendor [were] *completely derivative* of Manville's rights as the primary insured" on the insurance policies at issue. *Id.* at 92 (emphasis added); *see also Manville III*, 517 F.3d at 62 (noting that, in *MacArthur*, we "reason[ed] that the 1986 orders precluded suits against a significant asset of the bankruptcy estate—Manville's insurance policies—and that MacArthur's coverage claim clearly affected that asset" (footnote omitted)). Chubb, however, seeks to preserve its rights against a non-debtor relating to funds that are not part of Manville's bankruptcy estate. Therefore, the discretionary "law of the case" doctrine does not counsel us to affirm based on our prior holding in *MacArthur*.

In addition to its citation to *MacArthur*, the district court offered two more reasons for its rejection of Chubb's due process argument. The court reasoned that there is "an exception to the due process concerns raised by Chubb 'where a special remedial scheme exists expressly foreclosing successive litigation by nonlitigants, as for example in bankruptcy or probate.'" *Manville II*, 340 B.R. at 68 (quoting *Ortiz*, 527 U.S. at 846, 119 S.Ct. 2295). It also held that the publication

notice issued in 1984 was sufficient to "put Chubb . . . on notice with regards to whatever asbestos-related claims it may have against Travelers and the other settling insurers." *Id.* To consider the merits of this reasoning, we must begin with an examination of the Direct Actions, Chubb's claims against Travelers for contribution and indemnity, and the 1986 Orders as they were interpreted by the bankruptcy court in 2004.

The gravamen of the Common Law Direct Actions, as the bankruptcy court acknowledged, is that "the insurance industry as a whole had a duty to warn the general public about the dangers of asbestos." *Manville III*, 517 F.3d at 60 n. 17 (citing *Manville I*, 2004 WL 1876046, at *19-21); *see also id.* at 58 (describing the Common Law Direct Actions). The first time that this case was before us, Travelers "candidly admit[ted]" that these actions "seek damages from Travelers that are *unrelated* to the policy proceeds" that are assets of Manville's Chapter 11 estate. *Id.* at 63 (emphasis in original). Relatedly, we pointed out that the Direct Actions were "quite unlike the claims in *MacArthur*," and that they did not "seek to collect on the basis of Manville's conduct." *Id.* The Supreme Court made similar observations in *Bailey:* "It is undisputed that many of the [Direct Action] plaintiffs seek to recover from Travelers, not indirectly for Manville's wrongdoing, but for Travelers' own alleged violations of state law," and "many of the suits at issue seek to hold Travelers liable for independent wrongdoing rather than for a legal wrong by Manville." *Bailey*, 129 S.Ct. at 2200 & n. 2. In short, whatever the text of the 1986

Orders, many of the Direct Actions referenced in the bankruptcy court's 2004 Orders do not seek to collect from the *res* of Manville's Chapter 11 bankruptcy estate.

Chubb's contribution and indemnity claims are similar in this regard. *See Manville III*, 517 F.3d at 60 n. 17. Chubb has been named as a defendant, along with other asbestos-industry insurers, in the sort of Common Law Direct Actions that the bankruptcy court held are barred against Travelers by the 1986 Orders. *See Bailey*, 129 S.Ct. at 2202 n. 3. Chubb, like the plaintiffs in the Direct Actions, does not seek to collect from the proceeds of the policies that Travelers issued to Manville. Rather, Chubb seeks to preserve its ability to collect from Travelers itself—through state-law claims for contribution and indemnity—a portion of any liability that might be imposed on "the insurance industry as a whole" in the Common Law Direct Actions. *Manville III*, 517 F.3d at 60 n. 17. These claims, like the vast majority of the Direct Actions, are not derivative of Manville's liability and do not seek to collect from the *res* of the Manville estate.

In *Manville III*, we held that the bankruptcy court lacked subject matter jurisdiction to enjoin such claims against non-debtor Travelers in Manville's Chapter 11 proceedings. "[A] bankruptcy court only has jurisdiction to enjoin third-party non-debtor claims that directly affect the *res* of the bankruptcy estate." *Id.* at 66. Our reasoning was straightforward. The bankruptcy court's power derives, in part, from statutes enacted by Congress. *See In re Combustion Eng'g, Inc.*, 391 F.3d 190, 225 (3d Cir.2004) ("[T]he exer-

cise of bankruptcy power must be grounded in statutory bankruptcy jurisdiction."). In the bankruptcy code, "Congress has granted the . . . courts expansive bankruptcy jurisdiction to adjudicate claims against a debtor's estate." *In re Millenium Seacarriers, Inc.*, 419 F.3d 83, 92 (2d Cir.2005). This jurisdiction is *in rem* in nature; it "permits a determination of all claims that 'anyone, whether named in the action or not, has *to the property* or thing in question.' " *Id.* (emphasis added) (quoting *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 448, 124 S.Ct. 1905, 158 L.Ed.2d 764 (2004)).

In this case, the "thing in question" is the Manville bankruptcy estate, and the insurance policies that Travelers issued to Manville are the estate's most valuable asset. *See MacArthur*, 837 F.2d at 94. In *Manville III*, we held that the bankruptcy court's *in rem* jurisdiction was insufficient to allow it to enjoin Direct Actions based on state-law legal theories that seek to impose liability on Travelers as a separate entity rather than on the policies that it issued to Manville. Although we focused on the Direct Actions in our analysis, Chubb's contribution and indemnity claims against Travelers are functionally identical in this respect.

In *Bailey*, the Supreme Court reversed *Manville III* on "narrow" grounds. *Bailey*, 129 S.Ct. at 2207. The *Bailey* Court did not contradict the conclusion of our jurisdictional inquiry. *See id.* ("We do not resolve whether a bankruptcy court, in 1986 or today, could properly enjoin claims against nondebtor insurers that are not derivative of the debtor's wrongdoing."). Instead,

it held that the jurisdictional issue was not subject to collateral attack. Following direct review in *MacArthur*, the 1986 Orders "became *res judicata* to the parties and those in privity with them . . . as to any . . . admissible matter [that] might have been offered" to defeat the bankruptcy court's entry of the 1986 Orders. *Id.* at 2205 (internal quotation marks omitted). The *Bailey* Court's holding was grounded in the "practical necessit[ies]" served by *res judicata* and principles of finality. *Id.* at 2206. These necessities were dispositive as to the parties to the 1986 proceedings "and those in privity with them," "*whether or not* [the 1986 Orders were] proper exercises of bankruptcy court jurisdiction and power." *Id.* at 2205, 2206 (emphasis added).

On remand, we remain persuaded that the 1986 Orders, as interpreted in 2004, exceed the bounds of the bankruptcy court's *in rem* jurisdiction. In 2004, the bankruptcy court interpreted the 1986 Orders to enjoin not only claims that are directed at the Travelers insurance policies in the *res* of the Manville estate, but also non-derivative claims by Chubb that seek to impose liability on Travelers separately. The bankruptcy court, in essence, interpreted the 1986 Orders to have an *in personam* effect.[13]

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[13] When a court exercises *in personam* authority, it addresses a claim for liability, such as one involving a claim for money damages, against a particular party. *See* Restatement (Second) of Judgments § 2 cmt. b, at 36-37; *Black's Law Dictionary* 930 (9th ed.2009) (defining "personal jurisdiction"); *see also Ret. Sys. of Ala. v. J.P. Morgan Chase & Co.*, 386 F.3d 419, 426 (2d Cir.2004) ("[A]n *in personam* action involves a controversy over liability rather than over possession of a thing."). In contrast, the bankruptcy court's

Tellingly, although Congress codified a version of the bankruptcy court's 1986 channeling injunction at 11 U.S.C. § 524(g), *see Manville III*, 517 F.3d at 67, the statute does not authorize injunctions of these sorts of claims against non-debtor third parties. Rather, section 524(g) only "limits the situations where a channeling injunction may enjoin actions against third parties to those where a third party has derivative liability for the claims against the debtor." *In re Combustion Eng'g, Inc.*, 391 F.3d at 234; *see also id.* at 235 n. 47. Nevertheless, under *Bailey*, the parties who were present or represented in the proceedings that led to the entry of the 1986 Orders are barred from collaterally attacking the bankruptcy court's 2004 interpretation. But that cannot be so as to Chubb, if making it subject to the 1986 Orders would violate due process. As a result, our due process analysis must take into account the *in personam* manner in which the 1986 Orders were interpreted by the bankruptcy court in 2004. Viewed from this perspective, the district court's reasoning unravels.

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in rem authority is, for the most part, limited to the resolution of claims against the property in the bankruptcy estate. *See* Restatement (Second) of Judgments § 2 cmt. b, at 37; *see also Black's Law Dictionary* 929 (9th ed.2009) (defining *in rem* jurisdiction as "[a] court's power to adjudicate the rights to a given piece of property"). Here, because Chubb's claims against Travelers for indemnity and contribution seek to impose liability on Travelers itself rather than the insurance policies that are assets of the Manville bankruptcy estate, the bankruptcy court's 2004 interpretation of the 1986 Orders attributed to those prior judicial acts an *in personam* effect.

The due process "exception" relied on by the district court and discussed by the Supreme Court in *Ortiz* was juxtaposed against the " 'principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.' " *Ortiz*, 527 U.S. at 846, 119 S.Ct. 2295 (quoting *Hansberry v. Lee*, 311 U.S. 32, 40, 61 S.Ct. 115, 85 L.Ed. 22 (1940)). Thus, the *Ortiz* Court was discussing an *in rem* "exception" to the due process principles associated with *in personam* jurisdictional acts. Moreover, the *Ortiz* Court quoted from *Martin v. Wilks*, 490 U.S. 755, 109 S.Ct. 2180, 104 L.Ed.2d 835 (1989). The full sentence from *Martin* reads:

> [W]here a special remedial scheme exists expressly foreclosing successive litigation by nonlitigants, as for example in bankruptcy or probate, legal proceedings may terminate preexisting rights *if the scheme is otherwise consistent with due process.*

Id. at 762 n. 2, 109 S.Ct. 2180 (emphasis added).

Relying on this authority, the district court reasoned that the bankruptcy court acted on an *in rem* basis: "Unlike the class action settlements in *[Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997)] and *Ortiz*, the injunction here is based on the Bankruptcy Court's *in rem* power over the Manville estate, including the insurance policies." *Manville II*, 340 B.R. at 68-69. The contrast between *in rem* bankruptcy proceedings and the

in personam class action settlements in *Amchem* and *Ortiz* was apt. But the court placed the Manville proceedings—at least in their present procedural posture—in the wrong category.

As we have already said, whatever the bankruptcy court's factual findings, Chubb's claims for contribution and indemnity seek to proceed against Travelers on an *in personam* basis. *See Manville III*, 517 F.3d at 63 ("[T]he factual determination was only half of the equation . . . . Neither court looked to the laws of the states where the claims arose to determine if indeed Travelers did have an independent legal duty in its dealing with plaintiffs, notwithstanding the factual background in which the duty arose."). The district court reasoned that, factually speaking, the Direct Actions and Chubb's claims fit within the 1986 Orders' injunction of claims "based upon, arising out of, or relating to any or all of the" policies issued by Travelers to Manville. *See Manville II*, 340 B.R. at 61. In doing so, it appears to have taken the view that the "based upon, arising out of, or relating to" language was necessarily confined to *in rem* claims against the Manville estate.

But the bankruptcy court's 2004 interpretation of the 1986 Orders is not so limited. Chubb does not, as a legal matter, seek to collect from the insurance policies that Travelers issued to Manville. Thus, contrary to the district court's ruling, the bankruptcy court was not exercising its *in rem* power when it concluded that Chubb's claims were enjoined.[14] Therefore, the "special

[14] Travelers seems to agree that the bankruptcy court did more than resolve claims against the *res* of the Manville

remedial scheme" due process "exception" relating to *in rem* bankruptcy proceedings is insufficient to sustain the bankruptcy court's action as to Chubb.

Finally, we are also unpersuaded by the district court's conclusion that Chubb's due process rights were satisfied by the bankruptcy court's August 2, 1984 Notice of Hearing to Consider Approval of Compromise and Settlement of Insurance Litigation. Given the manner in which the 1986 Orders have been interpreted, we are placed in legal territory that is undoubtedly *sui generis* as to the due process question before us. But, because the 1986 Orders purport to bind Chubb's *in personam* claims, the better due process analogy in terms of notice and representation principles is to class action settlements, not *in rem* bankruptcy proceedings. As a result, we find *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) and *Stephenson v. Dow Chemical Co.*, 273 F.3d 249 (2d Cir.2001) to be the pertinent authority.

In *Amchem*, a group of asbestos manufacturers sought to achieve final resolution of their liability by attempting to settle future, unfiled claims by potential asbestos claimants. 521 U.S. at 600-01, 117 S.Ct. 2231. Their chosen litigation mechanism was a settlement-only class action pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure. The manufacturers proposed a

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estate. In its October 26, 2009 post-argument submission, Travelers argued that the bankruptcy court's notice procedures relating to the 1986 Orders were "wholly consistent" with the exercise of "both *in rem* jurisdiction and *in personam* jurisdiction over all Chubb entities."

class of those who: (1) had not already filed an asbestos claim against the defendants, and (2) either had been exposed to asbestos or had family members who had been exposed. *Id.* at 603, 117 S.Ct. 2231. The lawyers purporting to act on behalf of this class "had no attorney-client relationship with such claimants," *id.* at 601, 117 S.Ct. 2231, but the parties' settlement applied to nearly all of the class's future claims. *See id.* at 604, 117 S.Ct. 2231. For example, the agreement sought to enjoin, and provided no compensation for, certain types of claims that would otherwise have been available under state law. *See id.* at 604, 117 S.Ct. 2231.

The district court conducted fairness hearings, certified the class, and ultimately approved the settlement. *Id.* at 608, 117 S.Ct. 2231. The Third Circuit vacated the district court's orders, holding that factual and legal differences created "'serious intra-class conflicts.'" *Id.* at 610, 117 S.Ct. 2231 (quoting *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 630 (3d Cir.1996)).

The Supreme Court affirmed the court of appeals based on deficiencies in the proposed class under Rule 23. First, the Court held that the class could not satisfy the predominance requirement of Rule 23(b)(3) because, *inter alia*, "[d]ifferences in state law . . . compound[ed] the[ ] disparities" in the interests of the class. *Id.* at 624, 117 S.Ct. 2231. Second, the Court held that the named plaintiffs could not adequately represent the broad class of claimants because of the conflict between the presently injured claimants' interest in "generous immediate payments" and the exposure-only claimants' interest in "ensur-

ing an ample, inflation-protected fund for the future." *Id.* at 626, 117 S.Ct. 2231 (relying on Federal Rule of Civil Procedure 23(a)(4)). Finally, in language that we find directly relevant, the Court observed that

> [i]mpediments to the provision of adequate notice . . . rendered highly problematic any endeavor to tie to a settlement class persons with no perceptible asbestos-related disease at the time of the settlement. . . . Even if they fully appreciate the significance of class notice, those without current afflictions may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out.

Id. at 628. The Court declined to resolve this due process issue in light of its holding that the proposed class could not satisfy Rule 23, but it recognized "the gravity of the question whether class action notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous." *Id.*

In *Stephenson*, we relied on *Amchem* to address similar concerns regarding representation and notice in settlement-only class action proceedings. There, two veterans (the "*Stephenson* plaintiffs") commenced separate state-law actions based on allegations that they were exposed to Agent Orange during the Vietnam War. Both actions were filed well after a broad settlement agreement had been approved relating to a Rule 23(b)(3) class action against the same defendants based on similar allegations. 273 F.3d at 255-56. The previous settlement purported to resolve the

claims of individuals who had been exposed to Agent Orange but had not yet manifested injuries. *Id.* at 252. The *Stephenson* plaintiffs fit within the prior class, and their claims were transferred by the Multidistrict Litigation Panel to the Eastern District of New York, where the class action settlement had been adjudicated. *See id.* at 256. The district court characterized the *Stephenson* plaintiffs' actions as impermissible collateral attacks on the prior settlement, and it dismissed their claims pursuant to Rule 12(b)(6). *Id.*

We reversed, holding that the attack was permissible because the plaintiffs were not adequately represented in the prior litigation, and that the previous settlement was not *res judicata* as to the *Stephenson* plaintiffs' claims. *See id.* at 261. Regarding the collateral attack, we reasoned that the injunction that purported to bar the claims was "part and parcel of the judgment that plaintiffs contend failed to afford them adequate representation." *Id.* at 257. Consequently, the attack was permissible because it sought "only to prevent the prior settlement from operating as *res judicata* to their claims." *Id.*

With respect to whether the *Stephenson* plaintiffs' claims were barred by the prior settlement and the doctrine of *res judicata*, we relied on the due process concerns raised by the Supreme Court in *Amchem* and *Ortiz* and held that the plaintiffs were not adequately represented in the prior litigation. *Id.* at 260-61. In doing so, we reasoned that both plaintiffs fell within the earlier class definition, but that (1) neither had learned of their claims until after the settlement

fund was exhausted, and (2) the settlement made no provision for their claims. *Id.* at 260. Although our holding was based on representational concerns, we also pointed out that the plaintiffs "likely received inadequate notice" of the class action settlement because "*Amchem* indicates that effective notice could likely not ever be given to exposure-only class members." *Id.* at 261 n. 8.

Because of the *in personam* manner in which the 1986 Orders have been interpreted, the due process issues discussed in *Stephenson* and *Amchem* present grave representation and notice problems with respect to Chubb. As to representation, there is no indication in the record that the sort of claims Chubb seeks to bring against Travelers were contemplated, much less accounted for, during the proceedings that led to the 1986 Orders. Neither Travelers nor the district court have suggested otherwise, and the terms of the bankruptcy court's August 14, 1984 Order appointing the FCR make this point plain. The bankruptcy court ordered the FCR to concern himself with "persons who have been exposed to" Manville's asbestos products and who may subsequently "manifest disease post-petition." Chubb does not fall within that category, and its interests relating to inchoate, non-derivative, post-petition claims against Travelers were not spoken for in those proceedings.

We also conclude that the interests of the asbestos claimants who participated in the negotiations and hearings leading up to the 1986 Orders diverged from Chubb's future interests in a manner that precluded the claimants from adequately representing Chubb in those proceedings.

In *Amchem*, the Supreme Court found that single-class representation was inadequate under Rule 23(a)(4) because the interests of presently injured asbestos claimants conflicted with those of the exposure-only claimants: "[F]or the currently injured, the critical goal is generous immediate payments. That goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future." 521 U.S. at 626, 117 S.Ct. 2231. Although we do not rely on Rule 23 here, there is a similar divergence of interests between Chubb and the groups of asbestos claimants that participated in the negotiations that led to the 1986 Orders. Chubb's interest in the Manville proceedings in the early 1980s was far more attenuated than the exposure-only claimants at issue in *Amchem*, who at least had cause for concern regarding the same sort of harm as the presently injured claimants. More importantly, like the currently injured claimants in *Amchem*, asbestos claimants capable of bringing claims against Manville's insurance policies in 1986 were most likely focused on maximizing the value of immediate payments from a settlement fund. In contrast, Chubb's interest, similar to that of the exposure-only claimants in *Amchem*, would have been more directed at creating an "inflation-protected fund for the future," which would guard against the event, however improbable, that Chubb is found liable in a Common Law Direct Action and wishes to shift a proportionate share of the joint liability to Travelers. No such fund was created in 1986 (or 2004). Given these divergent interests, it cannot be said that counsel for

the claimants at the negotiations leading to the 1986 Orders sufficiently represented Chubb.

With respect to notice, we need not break any new ground relating to the constitutional requirements of an *in rem* bankruptcy proceeding. Nor are we called upon to set the outer bounds of the notice that would be required to satisfy Chubb's due process rights based on the manner in which the 1986 Orders have been interpreted. Under the unique circumstances of this case, there can be little doubt that the publication notice employed by the bankruptcy court in 1984 was insufficient to bind Chubb to the 2004 interpretation of the 1986 Orders.

The bankruptcy court's August 2, 1984 Notice of Hearing to Consider Approval of Compromise and Settlement of Insurance Litigation indicated that the parties to the Manville Chapter 11 proceedings were seeking an order enjoining all claims, "whether or not presently known," against the Settling Insurers "based upon, arising out of or relating to any or all of the insurance policies" that the Settling Insurers had issued to Manville. In order to comprehend that the contemplated channeling injunction would bar Chubb's *in personam*, non-derivative claims against Travelers, the recipient of this Notice would have to predict that the bankruptcy court would exceed its *in rem* jurisdiction in entering the 1986 Orders. Such a recipient would also have to be presumed to know—or to be able to discern from the 1984 Notice document—the factual extent of Travelers' relationship with Manville, which ultimately served as the lynchpin of the bankruptcy court's 2004 interpretation

of the 1986 Orders. *See Bailey*, 129 S.Ct. at 2203. The bankruptcy court's factfindings are presently uncontested, and Chubb was undoubtedly a "sophisticated insurer" in the early 1980s. *Manville II*, 340 B.R. at 68. But we cannot attribute to Chubb the sort of prescience that these predictions would have required, and the August 2, 1984 Notice was insufficient to communicate these issues.

To the extent that the Notice document could be interpreted to suggest that the 1984 Insurance Settlement Agreement would bar non-derivative claims against non-debtors, the parties publicly clarified their intentions by amending the agreement in a manner that indicated that Chubb *was not* an interested party in Manville's Chapter 11 proceedings. Specifically, when certain objectors to the settlement argued that the terms of the proposed channeling injunction exceeded the scope of the bankruptcy court's *in rem* jurisdiction, Travelers signed a letter agreement indicating that the objectors were wrong. The June 3, 1985 letter agreement stated that it was intended to "clarif[y] the intent of the parties with respect to certain provisions of the [1984 Insurance] Settlement Agreement," and that it was an "amendment" to the Agreement. One portion of the letter stated that "[t]he channeling order is intended only to channel claims against the *res* to the Settlement Fund and the injunction is intended only to restrain claims against the *res* (*i.e.*, the Policies) which are or may be asserted against the Settling Insurers."

Following this amendment to the 1984 Insurance Settlement Agreement, Chubb could not

have known that it was an interested party in Manville's bankruptcy proceedings or that the 1986 Orders would bar its non-derivative *in personam* claims against Travelers. In *Amchem*, the Supreme Court was concerned that, even if the exposure-only claimants "appreciate[d] the significance of class notice," they might "not have the information or the foresight needed to decide, intelligently, whether to stay in or opt out." *Amchem*, 521 U.S. at 628, 117 S.Ct. 2231. Similarly, even if Chubb received the Notice document, it could not have anticipated from the way the proceedings unfolded that its contribution and indemnity claims—which were abstract, "unimaginable," and inchoate at the time—would be enjoined. Therefore, it cannot be said that Chubb had constitutionally sufficient notice of the 1986 Orders, as interpreted by the bankruptcy court in 2004.

* * *

In conclusion, we hold that *MacArthur* does not foreclose Chubb's due process argument. We further hold that Chubb was not adequately represented in the proceedings that lead to the bankruptcy court's approval of the 1984 Insurance Settlement Agreement and the Manville Plan, and that it did not receive adequate notice of the 1986 Orders. Accordingly, both the bankruptcy court and the district court erred by rejecting Chubb's due process argument. Chubb is therefore not bound by the terms of the 1986 Orders. Consequently, it may attack the Orders collaterally as jurisdictionally void. And, as we held in *Manville III*, that attack is meritorious.

C. The Status of the Statutory and Hawaii Direct Action Settlements

The 2004 Direct Action Settlement relates to three categories of claims: the Common Law Direct Actions, the Statutory Direct Actions, and the Hawaii Direct Actions. Chubb only seeks to bring contribution and indemnity claims against Travelers in the Common Law Direct Actions, and our holding primarily relates to that portion of the broader settlement. Following the stipulated dismissal of the portions of these appeals relating to the Statutory and Hawaii Direct Actions, the parties to those agreements have requested that we sever them from the broader 2004 Direct Action Settlement and affirm the district court's rulings as to those agreements.

In *Manville III*, however, we declined in light of our holding to determine the prospective status of these agreements or to resolve arguments relating to technical objections and the 2004 Direct Action Settlement's overall fairness. *See Manville III*, 517 F.3d at 58 n. 13, 68 n. 26. Prudence counsels the same course here. Moreover, there is nothing in the 2004 Direct Action Settlement suggesting that severance would be an option at this juncture, or that such a remedial act would be undertaken by a court of appeals. We therefore decline to address the parties' remaining arguments relating to, *inter alia*, the reasonableness of the Common Law Direct Action Settlement and the bankruptcy court's award of attorneys' fees, and we again "leave it to the parties, with the aid of the bankruptcy court, to determine the status of their settlements." *Manville III*, 517 F.3d at 68 n. 26.

III. CONCLUSION

For the foregoing reasons, the district court's March 28, 2006 order is **AFFIRMED** as to the Objecting Plaintiffs and **REVERSED** as to Chubb. The case is **REMANDED** for further proceedings consistent with this opinion.

SUPREME COURT OF THE UNITED STATES

Nos. 08-295, 08-307

Argued: March 30, 2009
Decided: June 18, 2009[1]

TRAVELERS INDEMNITY CO. *et al.*,

Petitioners,

—v.—

PEARLIE BAILEY *et al.*

JUSTICE STEVENS filed dissenting opinion in which JUSTICE GINSBURG joined.

SOUTER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, THOMAS, BREYER, and ALITO, JJ., joined. STEVENS, J., filed a dissenting opinion, in which GINSBURG, J., joined.

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[1] Together with No. 08-307, *Common Law Settlement Counsel v. Bailey et al.*, also on certiorari to the same court.

BARRY R. OSTRAGER, New York City, *for Petitioners.*

SAMUEL ISSACHAROFF, New York City, *for Respondents Cascino Asbestos Claimants.*

JACOB C. COHN, Philadelphia, PA, *for Respondent Chubb Indemity Ins. Co.*

BARRY R. OSTRAGER, Counsel of Record, Myer O. Sigal, Jr., Andrew T. Frankel, Robert J. Pfister, Simpson Thacher & Bartlett LLP, New York, NY, *for Petitioners The Travelers Indemnity Company, Travelers Casualty and Surety Company and Travelers Property Casualty Corp.*

JASON R. SEARCY, Jason R. Searcy & Associates, P.C., Longview, TX, *for Cascino Asbestos Claimants.*

SANDER L. ESSERMAN, Stutzman, Bromberg, Esserman & Plifka, P.C., Dallas, TX, *for Pearlie Bailey, et al.*

JUSTICE SOUTER delivered the opinion of the Court.

As an element of the 1986 reorganization plan of the Johns-Manville Corporation (Manville), the United States Bankruptcy Court for the Southern District of New York enjoined certain lawsuits against Manville's insurers, including The Travelers Indemnity Company and its affiliates (Travelers). The question is whether the injunction bars state-law actions against Travelers based on allegations either of its own wrongdoing while acting

as Manville's insurer or of its misuse of information obtained from Manville as its insurer. We hold that the terms of the injunction bar the actions and that the finality of the Bankruptcy Court's orders following the conclusion of direct review generally stands in the way of challenging the enforceability of the injunction.

I

From the 1920s to the 1970s, Manville was, by most accounts, the largest supplier of raw asbestos and manufacturer of asbestos-containing products in the United States, *In re Johns-Manville Corp.*, 517 F.3d 52, 55-56 (2d Cir.2008), and for much of that time Travelers was Manville's primary liability insurer. *In re Johns-Manville Corp.*, No. 82 B 11656 etc. (Bkrtcy. Ct. SDNY 2004), App. to Pet. for Cert. in No. 08-295, pp. 111a-112a (hereinafter Bkrtcy. Ct. Op.). As studies began to link asbestos exposure to respiratory disease and thousands of lawsuits were filed against Manville, Travelers, as the insurer, worked closely with Manville to learn what its insured knew and to assess the dangers of asbestos exposure; it evaluated Manville's potential liability and defenses, and paid Manville's litigation costs. *Id.* at 114a-117a, 121a-122a. In 1982, the prospect of overwhelming liability led Manville to file for bankruptcy protection in the Southern District of New York.

It thus became incumbent on the Bankruptcy Court to devise "a plan of reorganization for [Manville] which would provide for payment to holders of present or known asbestos health

related claims . . . and [to] those persons who had not yet manifested an injury but who would manifest symptoms of asbestos-related illnesses at some future time." *In re Johns-Manville Corp.*, 97 B.R. 174, 176 (Bkrtcy.S.D.N.Y.1989). The ensuing reorganization plan created the Manville Personal Injury Settlement Trust (Trust) to pay all asbestos claims against Manville, which would be channeled to the Trust. See *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 640-641 (2d Cir.1988); *In re Johns-Manville Corp.*, 340 B.R. 49, 54 (S.D.N.Y.2006). The Trust has since paid out more than $3.2 billion to over 600,000 claimants. Bkrtcy. Ct. Op. 136a-137a.

In the period leading up to the reorganization, Manville and its insurers litigated over the scope and limits of liability coverage, and Travelers faced suits by third parties, such as Manville factory workers and vendors of Manville products, seeking compensation under the insurance policies. There was also litigation among the insurers themselves, who brought various indemnity claims, contribution claims, and cross-claims. *Id.* at 132a-134a. In a settlement described as the "cornerstone" of the Manville reorganization, the insurers agreed to provide most of the initial corpus of the Trust, with a payment of $770 million to the bankruptcy estate, $80 million of it from Travelers. *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 90 (2d Cir.1988); Bkrtcy. Ct. Op. 134a; *In re Johns-Manville Corp.*, 68 B.R. 618, 621 (Bkrtcy.S.D.N.Y. 1986).

There would have been no such payment without the injunction at the heart of the present dispute. The December 18, 1986, order of the

Bankruptcy Court approving the insurance settlement agreements (Insurance Settlement Order) provides that, upon the insurers' payment of the settlement funds to the Trust, "all Persons are permanently restrained and enjoined from commencing and/or continuing any suit, arbitration or other proceeding of any type or nature for Policy Claims against any or all members of the Settling Insurer Group." App. to Pet. for Cert. in No. 08-295, at 446a. The Insurance Settlement Order goes on to provide that the insurers are "released from any and all Policy Claims," which are to be channeled to the Trust. *Ibid.* The order defines "Policy Claims" as "any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be, asserted by any Person against . . . any or all members of the Settling Insurer Group based upon, arising out of or relating to any or all of the Policies." *Id.* at 439a. The insurers were entitled "to terminate the settlements if the injunctive orders [were] not issued or if they [were] set aside on appeal." *MacArthur, supra,* at 90.

The Insurance Settlement Order was incorporated by reference in the Bankruptcy Court's December 22, 1986, order confirming Manville's Second Amended and Restated Plan of Reorganization (Confirmation Order).[1] App. to Pet. for Cert. in No. 08-295, at 271a-272a. Both the Confirmation Order and the Insurance Settlement

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[1] The Confirmation Order itself contains an additional injunction barring certain claims against the settling insurance companies. Bkrtcy. Ct. Op. 286a-288a. That injunction does not bear on our decision, and we do not consider it.

Order (collectively, 1986 Orders) were affirmed by the District Court, see *In re Johns-Manville Corp.*, 78 B.R. 407 (S.D.N.Y.1987), and the Court of Appeals for the Second Circuit, see *MacArthur, supra; Kane, supra.*

Nonetheless, over a decade later plaintiffs started filing asbestos actions against Travelers in various state courts, cases that have been spoken of in this litigation as Direct Actions. They are of two sorts. The Statutory Direct Actions are brought under state consumer-protection statutes, and allege that Travelers conspired with other insurers and with asbestos manufacturers to hide the dangers of asbestos and to raise a fraudulent "state of the art" (or "no duty to warn") defense to personal injury claims. Bkrtcy. Ct. Op. 140a-143a. The Common Law Direct Actions claim that Travelers violated common law duties by failing to warn the public about the dangers of asbestos or by acting to keep its knowledge of those dangers from the public. *Id.* at 143a-147a. It is undisputed that many of the plaintiffs seek to recover from Travelers, not indirectly for Manville's wrongdoing, but for Travelers' own alleged violations of state law. See 517 F.3d, at 63.[2]

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[2] A true "direct action" suit is "[a] lawsuit by a person claiming against an insured but suing the insurer directly instead of pursuing compensation indirectly through the insured." Black's Law Dictionary 491 (8th ed.2004). Because many of the suits at issue seek to hold Travelers liable for independent wrongdoing rather than for a legal wrong by Manville, they are not direct actions in the terms of strict usage. Nonetheless, because the suits are referred to as "direct actions" in the decisions of the Bankruptcy Court, the District Court, and the Court of Appeals, we call them that as well, in the interest of simplicity. See 517 F.3d at 55 n. 4.

In 2002, Travelers invoked the terms of the 1986 Orders in moving the Bankruptcy Court to enjoin 26 Direct Actions pending in state courts. *Id.* at 58. The court issued a temporary restraining order, repeatedly extended, and referred the parties to mediation, which led to settlements between Travelers and three sets of plaintiffs in both Statutory and Common Law Direct Actions. Bkrtcy. Ct. Op. 103a-104a. Under the settlement terms Travelers would pay more than $400 million to settlement funds to compensate Direct Action claimants, contingent upon the entry of an order by the Bankruptcy Court clarifying that the Direct Actions were, and remained, prohibited by the 1986 Orders. *Id.* at 150a-152a. The settlement requires claimants seeking payment from the settlement funds to grant Travelers a release from further liability, separate and apart from Travelers' protection under the 1986 Orders. *Id.* at 151a-152a.

After notice of the settlement was given to potential claimants, the Bankruptcy Court (the same judge who had issued the 1986 Orders) held an evidentiary hearing and made extensive factual findings that are not challenged here. The court determined that "Travelers[']' knowledge of the hazards of asbestos was derived from its nearly three decade insurance relationship with Manville and the performance by Travelers of its obligations under the Policies, including through the underwriting, loss control activities, defense obligations and generally through its lengthy and confidential insurance relationship under the policies." *Id.* at 128a-129a. In sum, the Bankruptcy Court found that "Travelers learned virtually

everything it knew about asbestos from its relationship with Manville." *Id.* at 131a.

As for the Direct Actions, the court saw "[t]he gravamen of the Statutory Direct Action Lawsuits" as "center[ing] on Travelers['] defense of Manville in asbestos-related claims." *Id.* at 142a. The court read the "alleged factual predicate" of the Common Law Direct Actions as being "essentially identical to the statutory actions: Travelers . . . influence[d] Manville's purported failure to disclose knowledge about asbestos hazards; Travelers defended Manville; Travelers advanced the state of the art defense; and Travelers coordinated Manville's national defense effort." *Id.* at 147a (citations omitted). The court understood "the direct action claims against Travelers [to be] inextricably intertwined with Travelers['] long relationship as Manville's insurer," *id.* at 169a, and found that "[a]fter the Court preliminarily enjoined prosecution of Direct Action Claims against Travelers pending final ruling on the merits, certain plaintiffs' lawyers violated the letter and the spirit of this Court's rulings by simply deleting the term 'Manville' from their complaints-but leaving the substance unchanged," *id.* at 147a.

Hence, the court's conclusion that "[t]he evidence in this proceeding establishes that the gravamen of Direct Action Claims were acts or omissions by Travelers arising from or relating to Travelers['] insurance relationship with Manville." *Id.* at 173a. Finding that the "claims against Travelers based on such actions or omissions necessarily 'arise out of' and [are] 'related to'" the insurance policies, *ibid.*, which compelled Trav-

elers to defend Manville against asbestos-related claims, *id.* at 173a-176a, the Bankruptcy Court held that the Direct Actions "are-and always have been-permanently barred" by the 1986 Orders, *id.* at 170a.

The settlement was accordingly approved and an order dated August 17, 2004 (Clarifying Order), was entered, providing that the 1986 Orders barred the pending Direct Actions and "[t]he commencement or prosecution of all actions and proceedings against Travelers that directly or indirectly are based upon, arise out of or relate to Travelers[']] insurance relationship with Manville or Travelers[']] knowledge or alleged knowledge concerning the hazards of asbestos," including claims for contribution or indemnification. *Id.* at 95a. The Clarifying Order does not, however, block "the commencement and prosecution of claims against Travelers by policyholders other than Manville . . . for insurance proceeds or other obligations arising under any policy of insurance provided by Travelers to a policyholder other than Manville." *Id.* at 96a. The Clarifying Order also separately disclaims that it enjoins bringing

> "claims arising from contractual obligations by Travelers to policyholders other than Manville, as long as Travelers[']] alleged liability or the proof required to establish Travelers[']] alleged liability is unrelated to any knowledge Travelers gained from its insurance relationship with Manville or acts, errors, omissions or evidence related to Travelers[']] insurance relationship with Manville." *Ibid.*

Some individual claimants and Chubb Indemnity Insurance Company (Chubb), respondents before this Court, objected to the settlement and subsequently appealed.[3] So far as it matters here, the District Court affirmed, but the Court of Appeals for the Second Circuit reversed. In presenting the case to the Second Circuit the objectors argued that the Direct Actions fall outside the scope of the 1986 Orders and that the Clarifying Order erroneously expands those orders to bar actions beyond the Bankruptcy Court's subject-matter jurisdiction and statutory authority. Travelers and the settling claimants responded that the Clarifying Order is consistent with the terms of the 1986 Orders, that this reading of the 1986 Orders does not generate any jurisdictional or other statutory concerns, and that the Second Circuit's prior rejection of a challenge to the Insurance Settlement Order in *MacArthur*, 837 F.2d 89, is controlling.

In its opinion explaining the judgment under review here, the Second Circuit recognized that "[i]t is undisputed that the bankruptcy court had continuing jurisdiction to interpret and enforce its own 1986 orders," and that "there is no doubt that the bankruptcy court had jurisdiction to clarify its prior orders." 517 F.3d, at 60-61. It also had "little doubt that, in a literal sense, the instant claims against Travelers 'arise out of' its provision of insurance coverage to Manville," *id.* at 67, and

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[3] Chubb is a codefendant with Travelers in certain Common Law Direct Actions, and the Clarifying Order prevents it from bringing contribution and indemnity claims against Travelers under certain circumstances. See Brief for Respondent Chubb 16.

the court emphasized that "[t]he bankruptcy court's extensive factual findings regarding Manville's all-encompassing presence in the asbestos industry and its extensive relationship with Travelers support this notion" that the subjects of the Clarifying Order fall within the scope of the 1986 Orders, *ibid.* The Circuit nevertheless held that the Bankruptcy Court could not, in enforcing the 1986 Orders, "enjoin claims over which it had no jurisdiction," *id.* at 61, and that "[t]he ancillary jurisdiction courts possess to enforce their own orders is itself limited by the jurisdictional limits of the order sought to be enforced," *id.* at 65 n. 22 (internal quotation marks omitted). See also *id.* at 65 ("The fact that our case involves a clarification of the bankruptcy court's prior order does not alter the jurisdictional predicate necessary to enjoin third-party non-debtor claims").

The Court of Appeals found that "the jurisdictional analysis by the lower courts falls short," *id.* at 62, in failing to recognize the significance of the fact that the Direct Actions "do not seek to collect on the basis of Manville's conduct," but rather "seek to recover directly from Travelers, a non-debtor insurer, for its own alleged misconduct," *id.* at 63. The Court of Appeals held that the Bankruptcy Court mistook its jurisdiction when it enjoined "claims brought against a third-party non-debtor solely on the basis of that third-party's financial contribution to a debtor's estate," because "a bankruptcy court only has jurisdiction to enjoin third-party non-debtor claims that directly affect the *res* of the bankruptcy estate." *Id.* at 66.

In reaching this result, the court explained that its prior decision in *MacArthur* was not controlling, as there a Manville asbestos distributor had challenged the authority of the Bankruptcy Court to bar it from collecting out of Manville's own insurance coverage. 517 F.3d, at 62. Here, by contrast, "Travelers candidly admits that both the statutory and common law claims seek damages from Travelers that are *unrelated* to the policy proceeds." *Id.* at 63. The Court of Appeals also considered the 1994 enactment of 11 U.S.C. § 524(g), which provides explicit statutory authority for a bankruptcy court to order the channeling of claims against a debtor's insurers to the bankruptcy estate, but the court understood § 524(g) to be "limited to situations where a third party has derivative liability for the claims against the debtor" and "was not intended to reach non-derivative claims." 517 F.3d, at 68 (ellipsis and internal quotation marks omitted).

We granted certiorari, 555 U.S. ___, 129 S.Ct. 1606, 173 L.Ed.2d 673 (2009) and now reverse.

II

The Bankruptcy Court correctly understood that the Direct Actions fall within the scope of the 1986 Orders, as suits of this sort always have. The Court of Appeals, however, believed it was free to look beyond the terms of the 1986 Orders and so treated the action as one "concern[ing] the outer reaches of a bankruptcy court's jurisdiction." 517 F.3d at 55. This, we think, was error. If this were a direct review of the 1986 Orders, the Court of Appeals would indeed have been duty bound to

consider whether the Bankruptcy Court had acted beyond its subject-matter jurisdiction. See *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006); *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382, 4 S.Ct. 510, 28 L.Ed. 462 (1884). But the 1986 Orders became final on direct review over two decades ago, and Travelers' response to the Circuit's jurisdictional ruling is correct: whether the Bankruptcy Court had jurisdiction and authority to enter the injunction in 1986 was not properly before the Court of Appeals in 2008 and is not properly before us.

A

We begin at our point of agreement with the Second Circuit, that the Direct Actions are "Policy Claims" enjoined as against Travelers by the language of the 1986 Orders, which covered "claims, demands, allegations, duties, liabilities and obligations" against Travelers, known or unknown at the time, "based upon, arising out of or relating to" Travelers' insurance coverage of Manville. App. to Pet. for Cert. in No. 08-295, at 439a. In a statute, "[t]he phrase 'in relation to' is expansive," *Smith v. United States*, 508 U.S. 223, 237, 113 S.Ct. 2050, 124 L.Ed.2d 138 (1993), and so is its reach here, where "Policy Claims" covers not only "claims," but even "allegations" relating to the insurance coverage. Although it would be possible (albeit quite a stretch) to suggest that a "claim" only relates to Travelers' insurance coverage if it seeks recovery based upon Travelers' specific contractual obligation to Manville, "allegations" is not even remotely amenable to such a narrow con-

struction and clearly reaches factual assertions that relate in a more comprehensive way to Travelers' dealings with Manville.

The Bankruptcy Court's uncontested factual findings drive the point home. In substance, the Bankruptcy Court found that the Direct Actions seek to recover against Travelers either for supposed wrongdoing in its capacity as Manville's insurer or for improper use of information that Travelers obtained from Manville as its insurer. These actions so clearly involve "claims" (and, all the more so, "allegations") "based upon, arising out of or relating to" Travelers' insurance coverage of Manville, that we have no need here to stake out the ultimate bounds of the injunction. There is, of course, a cutoff at some point, where the connection between the insurer's action complained of and the insurance coverage would be thin to the point of absurd. See *California Div. of Labor Standards Enforcement v. Dillingham Constr., N. A., Inc.*, 519 U.S. 316, 335, 117 S.Ct. 832, 136 L.Ed.2d 791 (1997) (SCALIA, J., concurring) ("[A]pplying the 'relate to' provision according to its terms was a project doomed to failure, since, as many a curbstone philosopher has observed, everything is related to everything else"); *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995). But the detailed findings of the Bankruptcy Court place the Direct Actions within the terms of the 1986 Orders without pushing the limits.

Respondents argue that this is just revisionism perpetrated by the Clarifying Order, which they say improperly expanded the scope of the 1986

Orders to enjoin the Direct Actions. Their position appears to be that the 1986 Orders only bar actions against insurers seeking to recover derivatively for Manville's wrongdoing, but not actions to recover for Travelers' own misconduct, no matter what its relationship to Travelers' coverage of Manville. But this simply is not what the 1986 Orders say. The definition of "Policy Claims" contains nothing limiting it to derivative actions, and there is language in the 1986 Orders directly to the contrary: The 1986 Orders not only enjoin bringing expansively defined "Policy Claims" against the settling insurers, but they go on to provide that the injunction has no application to a claim previously brought against a settling insurer "seeking any and all damages (other than or in addition to policy proceeds) for bad faith or other insurer misconduct alleged in connection with the handling or disposition of claims." App. to Pet. for Cert. in No. 08-295, at 446a. There is no doubt about the implication, that this same sort of claim brought after the 1986 Orders become final will be barred. There would have been no need for this exception if "Policy Claims" were limited to claims against Travelers for Manville's wrongdoing.

Respondents seek further refuge in evidence that before entry of the 1986 Orders some parties to the Manville bankruptcy (including Travelers) understood the proposed injunction to bar only claims derivative of Manville's liability. They may well be right about that: we are in no position to engage in factfinding on this point, but there certainly are statements in the record that seem to support respondents' contention. See App. for Respondent Chubb 1a-3a, 5a, 13a-14a. But be that

as it may, where the plain terms of a court order unambiguously apply, as they do here, they are entitled to their effect. See, *e.g.*, *Negrón-Almeda v. Santiago*, 528 F.3d 15, 23 (1st Cir.2008) ("[A] court must carry out and enforce an order that is clear and unambiguous on its face"); *United States v. Spallone*, 399 F.3d 415, 421 (2d Cir.2005) ("[I]f a judgment is clear and unambiguous, a court must adopt, and give effect to, the plain meaning of the judgment" (internal quotation marks omitted)). If it is black-letter law that the terms of an unambiguous private contract must be enforced irrespective of the parties' subjective intent, see 11 R. Lord, Williston on Contracts § 30:4 (4th ed.1999), it is all the clearer that a court should enforce a court order, a public governmental act, according to its unambiguous terms.[4] This is all the Bankruptcy Court did.

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[4] Even if we found the 1986 Orders to be ambiguous as applied to the Direct Actions, and even if we concluded that it would be proper to look to the parties' communications to resolve that ambiguity, it is far from clear that respondents would be entitled to upset the Bankruptcy Court's interpretation of the 1986 Orders. Numerous Courts of Appeals have held that a bankruptcy court's interpretation of its own confirmation order is entitled to substantial deference. See *In re Shenango Group Inc.*, 501 F.3d 338, 346 (3rd Cir.2007); *In re Dow Corning Corp.*, 456 F.3d 668, 675 (6th Cir.2006); *In re Optical Technologies, Inc.*, 425 F.3d 1294, 1300 (11th Cir.2005); *In re Dial Business Forms, Inc.*, 341 F.3d 738, 744 (8th Cir.2003); *In re National Gypsum Co.*, 219 F.3d 478, 484 (5th Cir.2000); *In re Casse*, 198 F.3d 327, 333 (2nd Cir.1999); *In re Tomlin*, 105 F.3d 933, 941 (4th Cir.1997); *Monarch Life Ins. Co. v. Ropes & Gray*, 65 F.3d 973, 983 (1st Cir.1995); *In re Weber*, 25 F.3d 413, 416 (7th Cir.1994). Because the 1986 Orders clearly cover the Direct Actions, we need not determine the proper standard of review.

B

Given the Clarifying Order's correct reading of the 1986 Orders, the only question left is whether the Bankruptcy Court had subject-matter jurisdiction to enter the Clarifying Order. The answer here is easy: as the Second Circuit recognized, and respondents do not dispute, the Bankruptcy Court plainly had jurisdiction to interpret and enforce its own prior orders. See *Local Loan Co. v. Hunt*, 292 U.S. 234, 239, 54 S.Ct. 695, 78 L.Ed. 1230 (1934). What is more, when the Bankruptcy Court issued the 1986 Orders it explicitly retained jurisdiction to enforce its injunctions. See App. to Pet. for Cert. in No. 08-295, at 284a-286a.

The Court of Appeals, however, went on to a different jurisdictional inquiry. It held that the 1986 Orders could not be enforced according to their terms because, as the panel saw it, the Bankruptcy Court had exceeded its jurisdiction when it issued the orders in 1986. We think, though, that it was error for the Court of Appeals to reevaluate the Bankruptcy Court's exercise of jurisdiction in 1986.

On direct appeal of the 1986 Orders, anyone who objected was free to argue that the Bankruptcy Court had exceeded its jurisdiction, and the District Court or Court of Appeals could have raised such concerns *sua sponte*. In fact, one objector argued just that. In *MacArthur*, a distributor of Manville asbestos claimed to be a coinsured under certain Manville insurance policies and argued that the 1986 Orders exceeded the Bankruptcy Court's jurisdiction by preventing the distributor from recovering under the policies; the

Second Circuit disagreed, concluding that the Bankruptcy Court had not stepped outside its jurisdiction or statutory authority.[5] See 837 F.2d, at 91-94. But once the 1986 Orders became final on direct review (whether or not proper exercises of bankruptcy court jurisdiction and power), they became res judicata to the " 'parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.' " *Nevada v. United States*, 463 U.S. 110, 130, 103 S.Ct. 2906, 77 L.Ed.2d 509 (1983) (quoting *Cromwell v. County of Sac*, 94 U.S. 351, 352, 24 L.Ed. 195 (1877)).

Those orders are not any the less preclusive because the attack is on the Bankruptcy Court's conformity with its subject-matter jurisdiction, for "[e]ven subject-matter jurisdiction . . . may not be attacked collaterally." *Kontrick v. Ryan*, 540 U.S. 443, 455, n. 9, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004). See also *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376, 60 S.Ct. 317, 84 L.Ed. 329 (1940) ("[Federal courts] are

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[5] We agree with the Court of Appeals that *MacArthur* only resolved the narrow question whether the Bankruptcy Court could enjoin derivative claims against the insurers and did not address whether the 1986 Orders, in their entirety, were proper. We note *MacArthur* merely to illustrate the obvious: the 1986 Orders were subject to challenge, on jurisdictional grounds or otherwise, on direct review. The dissent suggests that *MacArthur* limited the scope of the 1986 Orders to derivative claims, see *post*, at 1, 7-9, but it did not. The question whether the Bankruptcy Court had enjoined or could properly enjoin nonderivative claims was not at issue in *MacArthur* and the court did not answer it.

courts with authority, when parties are brought before them in accordance with the requirements of due process, to determine whether or not they have jurisdiction to entertain the cause and for this purpose to construe and apply the statute under which they are asked to act. Their determinations of such questions, while open to direct review, may not be assailed collaterally"). So long as respondents or those in privity with them were parties to the Manville bankruptcy proceeding, and were given a fair chance to challenge the Bankruptcy Court's subject-matter jurisdiction, they cannot challenge it now by resisting enforcement of the 1986 Orders. See *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702, n. 9, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982) ("A party that has had an opportunity to litigate the question of subject-matter jurisdiction may not . . . reopen that question in a collateral attack upon an adverse judgment"); *Chicot County, supra*, at 375, 60 S.Ct. 317 ("[T]hese bondholders, having the opportunity to raise the question of invalidity, were not the less bound by the decree because they failed to raise it").[6]

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[6] The rule is not absolute, and we have recognized rare situations in which subject-matter jurisdiction is subject to collateral attack. See, *e.g.*, *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 514, 60 S.Ct. 653, 84 L.Ed. 894 (1940) (a collateral attack on subject-matter jurisdiction is permissible "where the issue is the waiver of [sovereign] immunity"); *Kalb v. Feuerstein*, 308 U.S. 433, 439-440, 444, 60 S.Ct. 343, 84 L.Ed. 370 (1940) (where debtor's petition for relief was pending in bankruptcy court and federal statute affirmatively divested other courts of jurisdiction to continue foreclosure proceedings, state-court foreclosure judgment was subject to collateral attack). More

The willingness of the Court of Appeals to entertain this sort of collateral attack cannot be squared with res judicata and the practical necessity served by that rule. "It is just as important that there should be a place to end as that there should be a place to begin litigation," *Stoll v. Gottlieb*, 305 U.S. 165, 172, 59 S.Ct. 134, 83 L.Ed. 104 (1938), and the need for finality forbids a court called upon to enforce a final order to "tunnel back . . . for the purpose of reassessing prior jurisdiction de novo," *In re Optical Technologies, Inc.*, 425 F.3d 1294, 1308 (11th Cir.2005). If the law were otherwise, and "courts could evaluate

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broadly, the Restatement (Second) of Judgments § 12, p. 115 (1980), describes three exceptional circumstances in which a collateral attack on subject-matter jurisdiction is permitted:

> "(1) The subject matter of the action was so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of authority; or
>
> "(2) Allowing the judgment to stand would substantially infringe the authority of another tribunal or agency of government; or
>
> "(3) The judgment was rendered by a court lacking capability to make an adequately informed determination of a question concerning its own jurisdiction and as a matter of procedural fairness the party seeking to avoid the judgment should have opportunity belatedly to attack the court's subject matter jurisdiction."
>
> This is no occasion to address whether we adopt all of these exceptions. Respondents do not claim any of them, and we do not see how any would apply here. This is not a situation, for example, in which a bankruptcy court decided to conduct a criminal trial, or to resolve a custody dispute, matters "so plainly beyond the court's jurisdiction" that a different result might be called for.

the jurisdiction that they may or may not have had to issue a final judgment, the rules of res judicata . . . would be entirely short-circuited." *Id.* at 1307; see *Willy v. Coastal Corp.*, 503 U.S. 131, 137, 112 S.Ct. 1076, 117 L.Ed.2d 280 (1992) ("[T]he practical concern with providing an end to litigation justifies a rule preventing collateral attack on subject-matter jurisdiction"). Almost a quarter-century after the 1986 Orders were entered, the time to prune them is over.[7]

III

Our holding is narrow. We do not resolve whether a bankruptcy court, in 1986 or today, could properly enjoin claims against nondebtor insurers that are not derivative of the debtor's wrongdoing. As the Court of Appeals noted, in 1994 Congress explicitly authorized bankruptcy courts, in some circumstances, to enjoin actions against a nondebtor "alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor to the extent such alleged liability ... arises by reason of ... the third

[7] Respondents point out that it is Travelers, not they, who moved the Bankruptcy Court to enforce the 1986 Orders. But who began the present proceedings has no bearing on the application of res judicata; to the extent respondents argue that the 1986 Orders should not be enforced according to their terms because of a jurisdictional flaw in 1986, this argument is an impermissible collateral attack. And to the extent respondents disclaim any initial intent to mount such an attack, this too is irrelevant, since the decision of the Court of Appeals is what we review and find at odds with finality.

party's provision of insurance to the debtor or a related party," and to channel those claims to a trust for payments to asbestos claimants. 11 U.S.C. § 524(g)(4)(A)(ii). On direct review today, a channeling injunction of the sort issued by the Bankruptcy Court in 1986 would have to be measured against the requirements of § 524 (to begin with, at least). But owing to the posture of this litigation, we do not address the scope of an injunction authorized by that section.[8]

Nor do we decide whether any particular respondent is bound by the 1986 Orders. We have assumed that respondents are bound, but the Court of Appeals did not consider this question. Chubb, in fact, relying on *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999), has maintained that it was not given constitutionally sufficient notice of the 1986 Orders, so that due process absolves it from following them, whatever their scope. See 340 B.R. at 68. The District Court rejected this argument, *id.* at 68-69, but the Court of Appeals did not reach it, 517 F.3d at 60, n. 17. On remand, the Court of Appeals can take up this objection and any others that respondents have preserved.

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[8] Section 524(h) provides that under some circumstances § 524(g) operates retroactively to validate an injunction. We need not decide whether those circumstances are present here.

IV

We reverse the judgment of the Court of Appeals and remand for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE GINSBURG joins, dissenting.

The Court holds that the plain terms of an injunction entered by the Bankruptcy Court as part of the 1986 reorganization of Johns-Manville Corporation (Manville) bar actions against Manville's insurers for their own wrongdoing. I disagree. In my view, the injunction bars only those claims against Manville's insurers seeking to recover from the bankruptcy estate for Manville's misconduct, not those claims seeking to recover against the insurers for their own misconduct. This interpretation respects the limits of the Bankruptcy Court's power; it is consistent with the Court of Appeals' understanding when it upheld the 1986 injunction on direct review and with Congress' codification of the Manville bankruptcy approach for future asbestos proceedings in 11 U.S.C. § 524(g); and it makes sense of Travelers' payment of $445 million in 2004 in exchange for a Bankruptcy Court order that supposedly "clarified" an unambiguous injunction.

Because the 1986 injunction has never meant what the Court today assumes, respondents' challenge is not an impermissible collateral attack. The Court of Appeals correctly concluded that the

Bankruptcy Court's 2004 order improperly enjoined the state-law claims at issue in this proceeding.

I

At the heart of the dispute in this litigation is the distinction between two types of lawsuits seeking recovery from Manville's primary insurer, The Travelers Indemnity Company, and its affiliates (together, Travelers). The first class, which I shall call "insurer actions," comprises suits in which the plaintiff is asserting that Travelers, as an insurer of Manville, has a duty to satisfy the plaintiff's claim against Manville. Plaintiffs in that class include not only members of the public exposed to asbestos but also Manville factory workers and vendors of Manville products. The second class, which I shall call "independent actions," comprises suits in which the plaintiff is asserting that Travelers is liable for its own misconduct. The plaintiffs in these suits have alleged both violations of state consumer-protection laws and breaches of common-law duties. See *ante,* at 2199-2200.

Suits that are called "direct actions" in the proceedings below and in the Court's opinion may fall in either category, but as the Court acknowledges the "true" definition of that term describes only insurer actions. *Ante,* at 2200, n. 2; see Black's Law Dictionary 491 (8th ed.2004). True direct actions are lawsuits in which a plaintiff claims that she was injured by Manville and seeks recovery directly from its insurer without first obtaining a judgment against Manville. The global

settlement that made the 1986 reorganization of Manville possible clearly encompassed all such direct actions; Manville's insurers paid $770 million, including $80 million from Travelers, into the Manville Personal Injury Settlement Trust (Manville Trust) to which these actions would be channeled. But many of the claims that gave rise to the instant litigation allege no breach of duty by Manville and seek no recovery from the Manville Trust. See *ante,* at 2200, n. 2. They are claims against Travelers based on its own alleged violations of state statutes and common-law rules. Thus, even though the Court calls these claims "direct actions," they are nothing of the sort. They are independent actions.

Some of the independent actions are based on facts concerning Travelers' insurance relationship with Manville. A number of suits, for example, allege that Travelers acquired information about asbestos-related hazards from Manville that it had a duty to disclose to third parties.[1] This sort of factual nexus does not, however, transform an independent action into an insurer action. Instead, the question remains whether a suit seeks to recover from Travelers for Manville's wrongdoing or instead seeks to recover from Travelers for its own wrongdoing, making no claim on Manville's insurance policy proceeds or other assets of the Manville bankruptcy estate.

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[1] The theories asserted in many of the state-law actions are novel, and, as the Court of Appeals noted, these claims "have met with almost universal failure in the state courts." *In re Johns-Manville Corp.*, 517 F.3d 52, 68 (2d Cir.2008).

Recognizing the distinction between insurer actions and independent actions, the Court of Appeals held that the Bankruptcy Court had improperly enjoined the latter in its 2004 order.[2] Without ruling on the extent of the Bankruptcy Court's power, see *ante*, at 2207, the Court today concludes that the 1986 injunction unambiguously barred independent actions and that the Bankruptcy Court's 2004 order simply clarified, and did not enlarge, the scope of that injunction. Based on that premise, the Court holds that respondents are challenging the Bankruptcy Court's authority to have issued the injunction in 1986, and it deems the challenge an impermissible collateral attack. I disagree with both the Court's understanding of the 1986 injunction and its attendant res judicata analysis.

II

The 1986 order of the Bankruptcy Court approving the insurance settlement agreements (Insurance Settlement Order), which was incorporated by reference in the order confirming Manville's plan of reorganization, includes three related protections for Manville's insurers, each focused on the company's insurance policies. It releases the insurers from all "Policy Claims," channels these claims to the Manville Trust, and permanently

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[2] The Court of Appeals noted that the Bankruptcy Court had not considered whether the various actions at issue were properly classified as insurer actions or independent actions, and it remanded for the Bankruptcy Court to undertake this assessment.

enjoins all persons from commencing or continuing a proceeding for "Policy Claims" against a settling insurer. App. to Pet. for Cert. 445a-446a. The Insurance Settlement Order defines "Policy Claims" as:

> "any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be, asserted by any Person against any or all members of the [Manville] Group or against any or all members of the Settling Insurer Group *based upon, arising out of or relating to any or all of the Policies*." *Id.* at 439a (emphasis added).[3]

Focusing on the italicized phrase, and particularly the term "relating to," the Court declares that this language "is not even remotely amenable" to a construction that excludes independent actions and "clearly reaches factual assertions that relate in a more comprehensive way to Travelers' dealings with Manville." *Ante,* at 2203-2204. Thus, it concludes that "the plain terms of

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[3] As the Court notes, the order confirming Manville's reorganization plan contains an additional injunction barring claims against the settling insurance companies. *Ante,* at 2200, n. 1. The language in that order enjoins only insurer actions. See App. to Pet. for Cert. 286a-288a (enjoining actions against settling insurance companies seeking, directly or indirectly, to recover on or with respect to a "Claim, Interest, or Other Asbestos Obligation"); *id.* at 56a, n. 6 (defining "Other Asbestos Obligation" as an obligation arising directly or indirectly from acts or omissions of a debtor). The parties accordingly focus on whether the Insurance Settlement Agreement enjoins independent actions.

[the] court order unambiguously" bar independent actions. *Ante*, at 2204.

The Court doth protest too much. Indeed, despite its insistence that the definition of "Policy Claims" is unambiguous, the Court quickly concludes that it cannot apply the "based upon, arising out of or relating to" language literally because there is a "cutoff at some point, where the connection between the insurer's action complained of and the insurance coverage would be thin to the point of absurd." *Ante*, at 2203-2204. Presumably, for instance, the Court would not deem enjoined a state-law claim for personal injuries caused by a Travelers' agent's reckless driving while en route to the courthouse to defend Manville even though, in a literal sense, this suit relates to (perhaps even arises out of) Travelers' performance of its policy obligations to Manville. The Court determines that it need not "stake out the ultimate bounds of the injunction" because it can rely on the Bankruptcy Court's "uncontested factual findings" that the particular independent actions at issue fall within the category that it had intended to enjoin. *Ibid.*

If the definition of the term "Policy Claims" is not amenable to a purely literal construction and the Court must look beyond the four corners of the Insurance Settlement Order to ascertain its meaning, however, the Bankruptcy Court's factual findings in 2004 are not the best guide. I would instead construe the order with reference to the limits of the Bankruptcy Court's authority—limits that were well understood by the insurers during the original settlement negotiations—and with reference to the Court of Appeals' interpretation of

the Insurance Settlement Order when it upheld it against a jurisdictional challenge in 1988.

We should not lightly assume that the Bankruptcy Court entered an order that exceeded its authority. When a bankruptcy proceeding is commenced, the bankruptcy court acquires control of the debtor's assets and the power to discharge its debts. A bankruptcy court has no authority, however, to adjudicate, settle, or enjoin claims against nondebtors that do not affect the debtor's estate. Because Travelers' insurance policies were a significant asset of the Manville bankruptcy estate, the Bankruptcy Court had the power to channel claims to the insurance proceeds to the Manville Trust. But this by no means gave it the power to enjoin claims against nondebtors like Travelers that had no impact on the bankruptcy estate. Thus, even accepting the Bankruptcy Court's representation in 2004 that it had "meant to provide the broadest protection possible" to the settling insurers, App. to Pet. for Cert. 172a, such relief could not include protection from independent actions.

That the Bankruptcy Court was without authority to enjoin independent actions was well understood by both Manville and Travelers during their settlement negotiations. In Manville's memorandum in support of the Insurance Settlement Agreement, it clarified that it did "not seek to have [the Bankruptcy] Court release its Settling Insurers from claims by third parties based on the Insurer's own tortious misconduct towards the third party" but rather sought only to release the insurers "from the rights Manville might itself have against them or rights derivative of

Manville's rights under the policies being compromised and settled." App. for Respondent Chubb Indemnity Insurance Co. 5a. This understanding reflected not only the basic fact that the settlement was between Manville and its insurers (and not third parties), but also the parties' knowledge that the "Second Circuit [had held] that the bankruptcy courts lack power to discharge 'independent' claims of third parties against nondebtors." *Id.* at 5a-6a.

Travelers similarly acknowledged the limits of the Bankruptcy Court's power. Noting that "[t]he court has *in rem* jurisdiction over the Policies and thus the power to enter appropriate orders to protect that jurisdiction," it stated that "the injunction is intended only to restrain claims against the res (*i.e.*, the Policies) which are or may be asserted, against the Settling Insurers." *Id.* at 13a-14a;[4] see also *id.* at 10a (memorandum of the legal representative of the Bankruptcy Court noting that "[a]ll parties seem to agree that any injunction, channeling order and release is limited to this Court's jurisdiction over the *res*"). In short, it was apparent to the settling parties, and no doubt also to the Bankruptcy Court, that the court lacked the power to enjoin third-party claims against nondebtors that did not affect the debtor's estate.

When the Court of Appeals upheld the injunction barring the assertion of "Policy Claims"

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[4] This statement of Travelers' intent belies the Bankruptcy Court's suggestion that enjoining independent actions was a necessary condition of Travelers' contribution to the Manville estate. See App. to Pet. for Cert. 170a-173a.

against Manville's insurers it, too, understood these limits of the Bankruptcy Court's authority. MacArthur Corporation, a Manville asbestos distributor, claimed to be a coinsured under Manville's insurance policies by virtue of "vendor endorsements" in those policies entitling distributors to insurance coverage for claims arising from their sale of Manville products. MacArthur argued that the Bankruptcy Court lacked authority to issue the Insurance Settlement Order, which prevented it from suing the insurers, because this order constituted a *de facto* discharge in bankruptcy of nondebtor parties not entitled to Chapter 11 protection. In rejecting MacArthur's argument, the Court of Appeals did not hold that the Bankruptcy Court possessed the authority to enjoin all actions against the insurers bearing some factual connection to Manville. Rather, it held that MacArthur had misconstrued the scope of the Bankruptcy Court's order, which precluded "only those suits against the settling insurers that arise out of or relate to Manville's insurance policies." *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 91 (2d Cir.1988).

The Court of Appeals reasoned that this language enjoined MacArthur's claims because "MacArthur's rights as an insured vendor are completely derivative of Manville's rights as the primary insured." *Id.* at 92. Just as asbestos victims were "barred from asserting direct actions against the insurers," so too was MacArthur barred because "*in both instances, third parties seek to collect out of the proceeds of Manville's insurance policies on the basis of Manville's conduct.*" *Id.* at 92-93 (emphasis added). The Court of Appeals fur-

ther held that, because Manville's policies were property of the bankruptcy estate, the Bankruptcy Court had "properly issued the orders pursuant to its equitable and statutory powers to dispose of the debtor's property free and clear of third-party interests and to channel those interests to the proceeds thereby created." *Id.* at 91.

As the Court of Appeals recognized in the instant proceedings, its earlier interpretation of the Insurance Settlement Order in *MacArthur* did not and does not extend to the independent actions at issue in the instant suit: "Travelers candidly admits that both the statutory and common law claims seek damages from Travelers that are *unrelated* to the policy proceeds, quite unlike the claims in *MacArthur* . . . where plaintiffs sought indemnification or compensation for the tortious wrongs of Manville to be paid out of the proceeds of Manville's insurance policies." *In re Johns-Manville Corp.*, 517 F.3d 52, 63 (2nd Cir.2008). Also in contrast to *MacArthur*, "the claims at issue here do not seek to collect on the basis of Manville's conduct. . . . Instead, the Plaintiffs seek to recover directly from Travelers, a non-debtor insurer, for its own alleged misconduct." *Ibid.*

The Court of Appeals' interpretation of the 1986 Insurance Settlement Order as enjoining only insurer actions and not independent actions is further supported by a statutory provision patterned after the Manville settlement. In the Bankruptcy Reform Act of 1994, Congress adopted 11 U.S.C. § 524(g) to expressly authorize the approach of the Manville bankruptcy in future asbestos-related bankruptcies. In granting bankruptcy courts the power to provide injunctive relief to nondebtors,

Congress stated that courts may bar an action directed against a third party who "is alleged to be *directly or indirectly liable for the conduct of, claims against, or demands on the debtor* to the extent such alleged liability of such third party arises by reason of . . . the third party's provision of insurance to the debtor or a related party." § 524(g)(4)(A)(ii) (emphasis added). As the italicized language makes clear, the statute permits a bankruptcy court to enjoin actions seeking to proceed against a nondebtor insurer for a debtor's wrongdoing, but it does not confer power to enjoin independent actions arising out of the insurer's own wrongdoing. See generally *In re Combustion Engineering, Inc.*, 391 F.3d 190, 235, n. 47 (3rd Cir.2004) (explaining that § 524(g), like the Manville injunction, is limited to insurer actions). Had Congress interpreted "Policy Claims" in the manner the Court does today, and had it sought to codify that definition, it would have used broader language.

Finally, it is worth asking why Travelers paid more than $400 million in 2004 to three new settlement funds in exchange for the Bankruptcy Court's order "clarifying" that the independent actions "are—and always have been—permanently barred" by the 1986 injunction. App. to Pet. for Cert. 170a. If the 1986 injunction were as clear as the Court assumes, surely Travelers would not have paid $445 million—more than five times the amount of its initial contribution to the Manville Trust—to obtain a redundant piece of paper.

In sum, I believe the 1986 Insurance Settlement Order did not enjoin independent actions of the sort giving rise to these proceedings. A contrary

conclusion ignores the limits of the Bankruptcy Court's authority, the Court of Appeals' interpretation of the order upheld on direct review in 1988, Congress' approval of the Manville reorganization, and Travelers' own conduct during both the 1986 and 2004 settlement negotiations.

III

The Court's holding that respondents' challenge is an impermissible collateral attack is predicated on its determination that the 1986 Insurance Settlement Order plainly enjoined their independent actions. See *ante*, at 2204-2205. Because I disagree with this premise, I also disagree with the Court's preclusion analysis. In challenging the Bankruptcy Court's 2004 order "clarifying" the scope of the Insurance Settlement Order, respondents were in fact timely appealing an order that *rewrote* the scope of the 1986 injunctions. Their objection could not have been raised on direct appeal of the 1986 order because it was not an objection to anything in that order. And, of course, the Court of Appeals did not rule on a challenge to the enjoining of independent actions during direct review, as the Court acknowledges. See *ante*, at 2205, n. 5. To the contrary, it interpreted the 1986 order as reaching only insurer actions. Thus, there neither was nor reasonably could have been a prior challenge that the 1986 order impermissibly enjoined independent actions.

Because the Court regards respondents' challenge as a collateral attack, it brushes aside their jurisdictional objection to the Bankruptcy Court's 2004 order on the ground that "the Bankruptcy

Court plainly had jurisdiction to interpret and enforce its own prior orders." *Ante,* at 2205. But neither respondents nor the Court of Appeals contested that point. Rather, respondents argued that the Bankruptcy Court was not merely interpreting and enforcing its prior orders and that it had no jurisdiction to enjoin the independent actions when it approved the 2004 settlements. The Court of Appeals accordingly examined whether the 2004 order improperly expanded the scope of the 1986 injunction and concluded that it did, thereby enjoining claims that were beyond the Bankruptcy Court's power to enjoin.

In my view, the judgment of the Court of Appeals was correct. The 1986 Insurance Settlement Order did not bar independent actions, and the Bankruptcy Court lacked any basis for enjoining those actions in 2004. The independent actions have no effect on the bankruptcy estate, and "bankruptcy courts have no jurisdiction over proceedings that have no effect on the debtor." *Celotex Corp. v. Edwards,* 514 U.S. 300, 309, n. 6, 115 S.Ct. 1493, 131 L.Ed.2d 403 (1995). The Court of Appeals thus correctly concluded that the Bankruptcy Court had impermissibly enjoined "claims against Travelers that were predicated, as a matter of state law, on Travelers' own alleged misconduct and were unrelated to Manville's insurance policy proceeds and the *res* of the Manville estate." 517 F.3d at 68.

IV

Because I am persuaded that the 1986 Insurance Settlement Order did not encompass independent actions and that that Bankruptcy Court improperly enjoined such actions in 2004, I respectfully dissent.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2007

(Argued: November 16, 2007
Decided: February 15, 2008)

Docket Nos. 06-2099-bk (L), 06-2103-bk (con),
06-2105-bk (con), 06-2118-bk (con),
06-2186-bk (con)

IN RE: JOHNS-MANVILLE CORPORATION, DEBTOR

JOHNS-MANVILLE CORPORATION, MANVILLE CORPORATION, MANVILLE INTERNATIONAL CORPORATION, MANVILLE EXPORT CORPORATION, JOHNS-MANVILLE INTERNATIONAL CORPORATION, MANVILLE SALES CORPORATION F/K/A JOHNS-MANVILLE SALES CORPORATION, SUCCESSOR BY MERGER TO MANVILLE BUILDINGS MATERIALS CORPORATION, MANVILLE PRODUCTS CORPORATION AND MANVILLE SERVICE CORPORATION, MANVILLE INTERNATIONAL CANADA, INC., MANVILLE CANADA, INC., MANVILLE INVESTMENT CORPORATION, MANVILLE PROPERTIES CORPORATION, ALLAN-DEANE CORPORATION, KEN-CARYL RANCH CORPORATION, JOHNS-

MANVILLE IDAHO INC., MANVILLE CANADA SERVICE INC., SUNBELT CONTRACTORS INC.,
Debtors,

TRAVELERS CASUALTY AND SURETY COMPANY, TRAVELERS PROPERTY CASUALTY CORP., TRAVELERS INDEMNITY COMPANY, COMMON LAW SETTLEMENT COUNSEL, STATUTORY SETTLEMENT COUNSEL, HAWAII SETTLEMENT COUNSEL,
Movants-Appellees,

—v.—

CHUBB INDEMNITY INSURANCE COMPANY, ASBESTOS PERSONAL INJURY PLAINTIFFS, CASCINO ASBESTOS CLAIMANTS, PEARLIE BAILEY, SHIRLEY MELVIN, GENERAL LEE COLE, ROBERT ALVIN GRIFFIN, VERNON WARNELL, LEE FLETCHER ANTHONY,
Objectors-Appellants.

Before:

CALABRESI, SOTOMAYOR, and WESLEY,
Circuit Judges.

Appeals from an order of the United States District Court for the Southern District of New York (Koeltl, *J.*), entered on March 28, 2006, affirming in part and vacating in part the August 17, 2004 Findings of Fact and Conclusions of Law by the United States Bankruptcy Court, Southern District of New York (Lifland, *J.*), regarding

Travelers' motions for approval of certain settlement agreements and for entry of a Clarifying Order.

REVERSED.

SANDER L. ESSERMAN (Cliff I. Taylor, *on the brief*), Stutzman, Bromberg, Esserman & Plifka, PC, Dallas, TX (Douglas T. Tabachnik, Law Offices of Douglas T. Tabachnik, Manalapan, NJ, *on the brief*) *for Objector-Appellant Asbestos Personal Injury Plaintiffs.*

JACOB C. COHN (William P. Shelley, *on the brief*), Cozen O'Connor, Philadelphia, PA, *for Objector-Appellant Chubb Indemnity Insurance Company.*

JASON R. SEARCY, (Joshua P. Searcy, *on the brief*), Jason R. Searcy, P.C., Longview, TX, *for Objector-Appellant Cascino Asbestos Claimants.*

BARRY R. OSTRAGER (Andrew T. Frankel, *on the brief*), Simpson Thacher & Bartlett, LLP, New York, NY (Robert J. Pfister, Simpson Thacher & Bartlett, LLP, Los Angeles, CA, *on the brief*), *for Movants-Appellees Travelers Casualty and Surety Company, Travelers Property Casualty*

Corp., and Travelers Indemnity Company.

RONALD BARLIANT (Kenneth S. Ulrich, Kathryn A. Pamenter, *on the brief*), Goldberg, Kohn, Bell, Black, Rosenbloom & Moritz, Ltd., Chicago, IL (Karen A. Giannelli, Gibbons, Del Deo, Dolan, Griffinger & Vecchione, PC, Newark, NJ, *on the brief*), *for Movant-Appellee Common Law Settlement Counsel.*

MATTHEW GLUCK (Kent A. Bronson, *on the brief*), Milberg Weiss, LLP, New York, NY, *for Movant-Appellee Statutory Direct Action Plaintiffs and the Hawaii Plaintiffs.*

WESLEY, *Circuit Judge*:

Chubb Indemnity Insurance Company, Asbestos Personal Injury Plaintiffs,[1] and Cascino Asbestos

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[1] The Asbestos Plaintiffs are six asbestos claimants: Shirley Melvin for the Estate of Joyce Myers, Pearlie Bailey for the estate of James Bailey, Lee Fletcher Anthony, General Lee Cole, Robert Alvin Griffin and Vernon Warnell. Ms. Melvin, Ms. Bailey and Mr. Warnell are clients of Provost & Umphrey, L.L.P., which represents approximately 10,000 claimants affected by the Common Law Settlement agreement, further discussed *infra*. Mr. Anthony, Mr. Cole and Mr. Griffin are clients of Reaud, Morgan & Quinn and Environmental Litigation Group, P.C., which jointly represents 8,300 claimants affected by the Common Law Settlement Agreement.

Claimants[2] ("Appellants") appeal from an order of the District Court for the Southern District of New York (Koeltl, *J.*) affirming in significant part and vacating in part the Findings of Fact and Conclusions of Law entered by the bankruptcy court (Lifland, *J.*) regarding Travelers'[3] motions for approval of certain settlement agreements and for entry of a Clarifying Order in connection with the Chapter 11 proceeding of the Johns-Manville Corporation ("Manville"). The bankruptcy court granted Travelers' motion to approve settlements with three separate classes of "Direct Action"[4] plaintiffs and, in conjunction with the settlements, issued an order clarifying that all Direct Action claims against Travelers were barred by the original 1986 injunction that issued as part of Manville's reorganization plan. Appellants, who

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[2] The Cascino Asbestos Claimants are Common Law asbestos claimants in Illinois, Wisconsin, Indiana, and Texas represented by Michael P. Cascino.

[3] "Travelers" is defined as: The Travelers Indemnity Company, Travelers Casualty and Surety Company, Travelers Property Casualty Corp., Citigroup Inc., The Travelers Insurance Company, Travelers Life and Annuity Company, and each of their respective direct or indirect parents, subsidiaries, and sister companies, as well as each of their respective predecessors, successors, assigns, officers, and directors.

[4] A "direct action" is defined as "[a] lawsuit by a person claiming against an insured but suing the insurer directly instead of pursuing compensation indirectly through the insured." BLACK'S LAW DICTIONARY 472 (7th ed. 1999). Because this term was used in the proceedings below, we use it here in the interest of clarity. However, as discussed *infra*, many of the suits in the instant case do not constitute true "direct action" claims.

were not party to the settlements, argue that the bankruptcy court erred by interpreting its prior order to enjoin suits brought against Travelers that allege independent misconduct by Travelers during its tenure as Manville's primary insurer. Appellants insist that the bankruptcy court was without subject matter jurisdiction to enjoin claims against Travelers that are not limited by the terms and scope of the insurance coverage Travelers provided Manville, do not seek recovery from Manville's insurance proceeds, and allege independent misconduct by Travelers. We conclude that the bankruptcy court erred insofar as it enjoined suits that, as a matter of state law, are predicated upon an independent duty owed by Travelers to the Appellants, that do not claim against the *res* of the Manville estate, and that seek damages in excess of and unrelated to Manville's insurance policy proceeds. The order of the District Court is VACATED and the case REMANDED for further proceedings consistent with this opinion.

Background

This case concerns the outer reaches of a bankruptcy court's jurisdiction. Manville was, by most sources, "the largest manufacturer of asbestos-containing products and the largest supplier of [raw] asbestos in the United States" from the 1920s until the 1970s. *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 742 (E.D.N.Y. & Bankr. S.D.N.Y. 1991), *vacated on other grounds*, 982 F.2d 721 (2d Cir. 1992), *modified on reh'g*, 993 F.2d 7 (2d Cir. 1993). In its heyday, Manville sold raw asbestos to manufacturers of asbestos-

based products in 58 countries and distributed its own asbestos-based products "across the entire spectrum of industries and employment categories subject to asbestos exposure." (Findings of Fact and Conclusions of Law Regarding Travelers Motions for Approval of Certain Settlement Agreements and for Entry of a Clarifying Order, dated Aug. 17, 2004 (Docket No. 3750), 2004 WL 1876046 (cited herein as "FOF" or "COL") at ¶ 3, 2004 WL 1876046, at *3, *aff'd in part, vacated in part by In re Johns-Manville Corp.*, 340 B.R. 49 (S.D.N.Y. 2006). As a result of studies linking asbestos with respiratory disease, Manville became the target of a growing number of products liability lawsuits in the 1960s and 1970s. *See Kane v. Johns-Manville Corp.*, 843 F.2d 636, 639 (2d Cir. 1988). Buckling under the weight of its asbestos liability, Manville filed for Chapter 11 protection on August 26, 1982.[5] *Id.*

The bankruptcy filing was without precedent, largely due to the nature of liability Manville faced: a person exposed to Manville asbestos might not develop an identifiable injury for decades.[6] *Id.*; *see*

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[5] At the time Manville filed its Chapter 11 petition it was a defendant in more than 12,500 asbestos-related suits. *Kane*, 843 F.2d at 639.

[6] As stated by the bankruptcy court:

> The ultimate challenge of these Chapter 11 cases was to formulate a plan of reorganization for the Debtors which would provide for payment to holders of present or known asbestos . . . claims . . . and those persons who have not yet manifested an injury but who would manifest symptoms of asbestos-related illnesses at some future time. . . . Through it all, this court, this Debtor, and the parties in interest have

also (FOF ¶ 52; 2004 WL 1876046, at *14). The bankruptcy court (Lifland, *J.*),[7] cognizant that Manville's insurance policies were the bankruptcy estate's most valuable asset, realized that the value of those policies to the estate was uncertain because Manville was engaged in extensive litigation with its insurance carriers regarding the scope and limits of its policies. (FOF ¶¶ 53-54; 2004 WL 1876046, at *14). To avoid the uncertainty of the insurance litigation and to fund its plan of reorganization, Manville sought to settle its insurance claims. *See MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 90 (2d Cir. 1988); (FOF ¶ 53; 2004 WL 1876046, at *14). Ultimately, Manville settled with its insurers for approximately $770 million.[8] *MacArthur*, 837 F.2d at 90.

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had to address societal, legal and economic issues on a scale heretofore unknown to Title 11 proceedings.

In re Johns-Manville Corp., 97 B.R. 174, 176 (Bankr. S.D.N.Y. 1989) (citing *In re Johns-Manville Corp.*, 68 B.R. 618, 624-25 (Bankr. S.D.N.Y. 186), *aff'd* 78 B.R. 407 (S.D.N.Y. 1987), *aff'd* 843 F.2d 636 (2d Cir. 1988) (internal quotation marks omitted)); *see also Kane*, 843 F.2d at 638, 639 (describing Manville as "one of the nation's most significant Chapter 11 bankruptcy proceedings" and noting that "[a] significant characteristic of . . . asbestos-related diseases is their unusually long latency period. An individual might not become ill from an asbestos-related disease until as long as forty years after initial exposure"). *Id.*

[7] Judge Lifland has honorably presided over the Manville proceedings since their inception.

[8] Further insurance settlements increased the funding substantially to in excess of $850 million.

Travelers, Manville's primary insurer from 1947 through 1976, paid nearly $80 million into the bankruptcy estate (in addition to the $20 million already paid in litigation expenses on behalf of Manville) in exchange for a "full and final release of Manville-related claims." (FOF ¶¶ 12, 58; 2004 WL 1876046, at *5, 15); *see also In re Johns-Manville Corp.*, 33 B.R. 254, 260-61 (Bankr. S.D.N.Y. 1983). Travelers' settlement, like those of the other Manville insurers, was predicated upon the bankruptcy court issuing an injunction that barred suits against Manville's insurers—including Travelers—and directed litigation by potential claimants instead against the Manville Personal Injury Settlement Trust ("Manville Trust"). (FOF ¶¶ 58, 61; 2004 WL 1876046, at *15). The injunction, embodied in the 1986 Confirmation Order (the "Confirmation Order") and the 1986 Insurance Settlement Order (the "Insurance Settlement Order"), channeled to the Manville Trust any and all claims that were based upon, arose out of, or related to Manville's liability insurance policies. (FOF ¶¶ 61-64; 2004 WL 1876046, at *15-16).

The Confirmation Order simultaneously enjoins "all persons" from commencing any action against any of the Settling Insurance Companies "for the purpose of, directly or indirectly, collecting, recovering or receiving payment of, on or with respect to any Claim . . . or Other Asbestos Obligation . . . ." (Order Confirming Debtors' Second Amended and Restated Plan of Reorganization, dated Dec. 22, 1986 at 25, ¶ 29). The bankruptcy court would note during this litigation that its "repeated use of the terms 'arising out of' and

'related to' were not gratuitous or superfluous; they were meant to provide the broadest protection possible to facilitate global finality for Travelers as a necessary condition for it to make a significant contribution to the Manville estate."[9] (COL ¶ 23; 2004 WL 1876046, at *31).

Undeterred by the 1986 orders, various groups of plaintiffs subsequently filed Direct Action lawsuits against Travelers and other insurers in several states under a variety of legal theories. (FOF ¶ 70; 2004 WL 1876046, at *17). These lawsuits fall into two broad categories: those based on statutory regulation of insurance practices (the "statutory claims") and those based on common law theories (the "common law claims"). (FOF ¶ 72; 2004 WL 1876046, at *17). The statutory claims aim to assert the rights of individuals who are dissatisfied with the settlements they received after negotiating with Travelers acting on behalf of Manville, or who declined to file personal injury suits against Manville because Travelers allegedly suppressed information about asbestos hazards and intentionally propagated an allegedly-fraudulent "state of the art" defense to frustrate the claimants' rights.[10] (FOF ¶ 73, 78;

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[9] The bankruptcy court's 1986 orders were previously affirmed by this Court in *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d at 94. In 1994, Congress amended the Bankruptcy Code to codify the Manville Injunction. *See* 11 U.S.C. § 524(g); *see also In re Johns-Manville Corp.*, 340 B.R. 49, 63 n.7 (S.D.N.Y. 2006).

[10] The "state of the art" defense is essentially an ability-to-foresee defense. The defense theory is that, at the time of a given asbestos exposure, there was no medical or scientific knowledge of a hazard from asbestos-containing

2004 WL 1876046, at *18). These plaintiffs allege that Travelers acquired knowledge about the dangers of asbestos through early asbestosis claims from as far back as the 1950s, "recognized the potential for future escalation of asbestos litigation and . . . influence[d] Manville's purported failure to disclose knowledge about asbestos hazards." (FOF ¶ 76; 2004 WL 1876046, at *18). Plaintiffs contend that Travelers' actions amount to a conspiracy in violation of state laws prohibiting unfair insurance trade and settlement practices. (FOF ¶ 74; 2004 WL 1876046, at *18). The common law claimants assert that Travelers violated alleged duties to disclose certain asbestos-related information it learned from Manville during Travelers' long tenure as Manville's primary insurer. (FOF ¶ 82; 2004 WL 1876046, at *19). Many of these theories of liability have not been accepted by any court. (FOF ¶ 81; 2004 WL 1876046, at *19).

The bankruptcy court found the factual predicate of the common law claims to be virtually identical to the predicate of the statutory actions: Travelers acquired knowledge regarding the dangers of asbestos in the 1950s, recognized the potential for future escalation of asbestos litigation, and influenced Manville's purported failure

products and, accordingly, there was no duty to warn the users of such products. Whatever its merits generally, this defense is, in any event, unavailing if the defendant had knowledge of a hazard associated with its asbestos-containing products and nevertheless failed to warn users. *See* Complaint in *Wise v. Travelers Indem. Co.*, No. 01-C-599 (W. Va. Cir. Ct., Berkeley County, Oct. 25, 2001) (Docket No. 3415, Ex. L), at ¶¶ 180-201.

to disclose its knowledge of asbestos hazards. (FOF ¶ 88; 2004 WL 1876046, at *20). For example, the *Gilchrist* plaintiffs allege that Travelers negligently performed inspections, conspired to deprive plaintiffs of information relating to the risks of asbestos exposure, and misrepresented and suppressed information regarding asbestos. (FOF ¶ 82; 2004 WL 1876046, at *19).

In response to the growing number of Direct Action lawsuits, on June 19, 2002, Travelers moved the bankruptcy court to enjoin twenty-six independent actions pending in Louisiana, Massachusetts, Texas, and West Virginia state courts pursuant to the 1986 orders.[11] After holding a series of hearings on the motion, the bankruptcy court referred the matter to mediation and appointed the Honorable Mario M. Cuomo, former Governor of the State of New York, as mediator.[12] Three classes of plaintiffs thereafter settled with Travelers: the "Statutory Direct Action Plaintiffs," the "Hawaii Plaintiffs," and the "Common Law Plaintiffs" (collectively, the "Plaintiff Appel-

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[11] Among these claims were two class actions, a consolidated case in West Virginia involving thousands of plaintiffs, and several individual actions. Of the 4,230 named plaintiffs in the lawsuits for whom information was obtained, at least 4,079 (over 96%) of them had already filed claims against the Manville Trust. Travelers subsequently filed with the bankruptcy court on January 22, 2003 and June 19, 2003 in an effort to enjoin other Direct Action Lawsuits pending in Texas and Ohio.

[12] The efforts of Governor Cuomo in this matter should not be overlooked. The Governor's considerable skill as a mediator is apparent from the record; his dedication to this matter is to be commended.

lees").[13] (FOF ¶¶ 93-105; 2004 WL 1876046, at *21-23). The settlements, which totaled almost $500 million, were conditioned upon the entry of an order by the bankruptcy court clarifying that the Direct Action lawsuits are, and have always been, prohibited by the 1986 orders. (FOF ¶¶ 100, 104; 2004 WL 1876046, at *22-23). The bankruptcy court summarized: "Travelers has contended throughout this proceeding that the Direct Action Claims are barred by the Court's prior orders . . . . Nonetheless, under the auspices of the Mediator, Travelers reached a series of landmark settlement agreements that will provide nearly a half billion dollars in additional compensation for asbestos victims." (FOF ¶ 93; 2004 WL 1876046, at *21). Both the Statutory Direct Action Settlement and the Common Law Direct Action Settlement require "plaintiffs who participate in the settlement fund to provide releases to Travelers, which would release Travelers from further liability separate and apart from the . . . direct actions or from the protection provided under [the bankruptcy court's] injunctions." (FOF ¶¶ 99, 103; 2004 WL 1876046, at *22-23).

On August 17, 2004, the bankruptcy court approved the settlement agreements and entered a "Clarifying Order" specifying that the Direct Action lawsuits against Travelers were barred by the 1986 orders.[14] (Order Approving Settlement of

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[13] Because we decide this case on other grounds, facts relating to the reasonableness of the settlements and Appellants' technical objections to the settlements are omitted.

[14] The Clarifying Order contained a judgment reduction

the Statutory, Hawaii and Common Law Direct Actions and Clarifying Confirmation Order, Including Insurance Settlement Order and Channeling Injunction, dated Aug. 17, 2004 (Docket No. 3751) ("Clarifying Order") at ¶¶ 6-8, 10).

After engaging in extensive fact-finding regarding Manville and its relationship with Travelers, (FOF ¶¶ 1-49; 2004 WL 1876046, at *2-13), the bankruptcy court determined that "Travelers learned virtually everything it knew about asbestos from its relationship with Manville." (FOF ¶ 50; 2004 WL 1876046, at *13). The court noted that while the Direct Action plaintiffs argued that their injuries were separate and independent from those incurred from asbestos exposure, each had experienced personal injury from some form of asbestos exposure. Because "the gravamen of [the] Direct Action Claims were acts or omissions by Travelers arising from or relating to Travelers' insurance relationship with Manville, . . . claims against Travelers based on such actions or omissions necessarily 'arise out of' and 'related to' the Policies." (COL ¶ 25; 2004 WL 1876046, at *32).

The court invoked our earlier decision in *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d at 93-94, in which we determined that the 1986 orders were jurisdictionally sound as they sought to protect a valuable asset of the bankruptcy

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provision that reduced the judgment obtained in Direct Action Suits against any objecting insurer by the greater of either (a) the amount that the relevant plaintiff received in the settlement, or (b) the amount that the non-settling insurer would have been entitled to obtain from Travelers in contribution or indemnity, had Travelers been party to the litigation. Clarifying Order at 8, ¶ 14.

estate—Manville's insurance contracts—and concluded that "the Second Circuit has already considered and rejected a claim that the provisions in the Confirmation Order and the Insurance Settlement Order . . . exceeded this Court's jurisdiction." (COL ¶ 9; 2004 WL 1876046, at *28). In the bankruptcy court's view, the Direct Actions violated the 1986 orders, as would future actions of the same variety. (COL ¶ 19; 2004 WL 1876046, at *30). The district court affirmed the bankruptcy court's findings of fact and conclusions of law in substantial part.[15] *In re Johns-Manville Corp.*, 340 B.R. 49, 72-73 (S.D.N.Y. 2006). The court labeled the Direct Action Claims as "creatively pleaded attempts to collect *indirectly* against the Manville insurance policies" and concluded that "barring these claims was a proper exercise of jurisdiction." *Id.* at 64 (citing COL ¶¶ 25-32; 2004 WL 1876046, at *32-33) (emphasis added). The district court recognized that there were jurisdictional limits on the scope of the injunction protecting Travelers from future direct actions: "[T]he Bankruptcy court has no jurisdiction to bar a suit alleging tortious conduct by Travelers on behalf of a non-Manville insured, conduct that is unrelated to Manville and not based on any knowledge of asbestos gained from

[15] The district court vacated the portion of the bankruptcy court's Findings and Clarifying Order relating to the so-called "gate-keeping" provision installed by the bankruptcy court. *In re Johns-Manville Corp.*, 340 B.R. at 65-66. As written, the "gate-keeping" provision required plaintiffs bringing "asbestos-related direct actions against Travelers" to file for and obtain the bankruptcy court's approval before proceeding. *Id.* at 66 n.12.

Manville, and that did not involve Manville asbestos or asbestos products." *Id.* at 65. These appeals followed.

Discussion

Although several of the parties raise ancillary issues, the current controversy is primarily a question of jurisdiction. Appellants argue that the bankruptcy court was without jurisdiction to enjoin third-party non-debtor suits against Travelers.[16] They insist that the bankruptcy court failed to properly distinguish between (a) claims that seek to recover directly from Travelers for Travelers' separate acts and (b) true Direct Action suits that seek to recover from an insurer contractually obligated to indemnify Manville for its misconduct.[17] Appellees, on the other hand,

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[16] Although Appellants specifically contest the bankruptcy court's jurisdiction to enjoin the common law claims, we consider the bankruptcy court's jurisdiction to enjoin both the statutory and common law claims to the extent that they are indistinguishable.

[17] Chubb Indemnity Insurance Company raises separate subject matter jurisdiction arguments and more generalized objections couched in due process. Because we decide this case on other grounds, we do not specifically address Chubb's claims. We do note, however, that the indemnity or contribution rights of Chubb and other insurers against Travelers do not significantly differ from the statutory and common law claims discussed herein. Although these contribution and indemnity claims are brought by insurers that were named in statutory and common law actions, their claims, like the underlying statutory and common law actions, are beyond the bankruptcy court's jurisdiction. *Cf. In re Johns-Manville Corp.*, 340 B.R. at 65 n.10 ("It also follows that because

are of the view that the bankruptcy court was merely enforcing its prior order. They are quick to point out that we have previously upheld the jurisdictional basis for that order's prohibition of an earlier set of policy-related claims. *See MacArthur*, 837 F.3d at 92-93.

It is undisputed that the bankruptcy court had continuing jurisdiction to interpret and enforce its own 1986 orders. *See In re Johns-Manville Corp.*, 340 B.R. at 59 (citing COL ¶ 8, 2004 WL 1876046, at *28); *see also In re Petrie Retail, Inc.*, 304 F.3d 223, 230 (2d Cir. 2002); Confirmation Order ¶ 28. And, as mentioned earlier, this Court has already considered and rejected a jurisdictional challenge to the 1986 orders. *See MacArthur*, 837 F.2d at 91-93; *Kane*, 843 F.2d at 643 n.4 (citing *MacArthur*). But while there is no doubt that the bankruptcy court had jurisdiction to clarify its prior orders, that clarification cannot be used as a predicate to enjoin claims

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the Bankruptcy Court had jurisdiction to enjoin the Direct Action Suits, it had jurisdiction to enjoin the claims by other insurers against Travelers for contribution or indemnity."). The district court determined that claims for contribution and indemnity were properly enjoined to "provide[ ] protection from other insurance companies who sought to hold Travelers liable indirectly for the damages that it could not be held directly liable to the individual claimants." *Id.* at 61. The fact that Chubb's contribution and indemnity rights are even at issue is indicative of the non-derivative liability that these claims allege: instead of stepping into the shoes of Manville or its vendors to recover some of Manville's insurance coverage, these plaintiffs allege that the insurance industry as a whole had a duty to warn the general public about the dangers of asbestos. (FOF ¶¶ 80-92; 2004 WL 1876046, at *19-21).

over which it had no jurisdiction. Thus, the bedrock jurisdictional issue in this case requires a determination as to whether the bankruptcy court had jurisdiction over the disputed statutory and common law claims. A careful review of the district court's endorsement of the bankruptcy court's analysis is in order.

The district court began its jurisdictional inquiry by considering whether the Direct Action suits and any related contribution and indemnification claims were covered by the 1986 orders. *In re Johns-Manville Corp.*, 340 B.R. at 59-61. After determining that a plain reading of the Insurance Settlement Order would include the Direct Action claims, the court noted that the bankruptcy court's intentional use of broad language in the 1986 orders was meant to provide Travelers with "global finality . . . as a necessary condition for it to make a significant contribution to the Manville estate." *Id.* at 60 (quoting COL ¶ 23; 2004 WL 1876046, at *31). The district court affirmed the bankruptcy court's interpretation of its 1986 orders as covering the Direct Action suits, finding it "reasonable to interpret the 1986 Orders as giving Travelers such broad protection against Direct Action Suits to induce it to contribute funds to the Manville Trust, which was key to the confirmation of the Manville [Bankruptcy] Plan." *Id.* at 61.

Having determined that the 1986 orders covered the suits at issue, the district court next considered whether the 1986 order themselves were a proper exercise of jurisdiction over non-debtors. *Id.* Relying on *MacArthur* and a Fifth Circuit case that considered the application of the

1986 orders to Direct Action claims filed against Travelers in Louisiana, *In re Davis*, 730 F.2d 176, 183-84 (5th Cir. 1984) (per curiam), the court concluded that "the Bankruptcy Court had jurisdiction over Travelers' insurance policies, and could act to protect them from dissipation by direct action claims." *In re Johns-Manville Corp.*, 340 B.R. at 63. Without considering the possibility of variations among these state law based claims, the court opined that "[s]uits that seek direct recovery authorized by state statutes from Travelers' insurance policies would reduce the estate's recovery from those policies, thus affecting the 'property of the estate.'" *Id.* Thus, the district court concluded that the bankruptcy court "had subject matter jurisdiction to enjoin these types of direct action claims." *Id.*

The court found congressional support for its conclusion in legislation that explicitly authorizes bankruptcy court "injunctions barring derivative claims against third party insurers." *Id.* (citing 11 U.S.C. § 524(g)). The court explained that 11 U.S.C. § 524(g), added to the Bankruptcy Code by the Bankruptcy Reform Act of 1994, was modeled on the Manville injunction. *See* H.R. Rep. 103-835, at 41 (1994), *reprinted in*

1994 U.S.C.C.A.N. 3340, 3349.[18] The district court viewed the statute as a congressional indication "that the Bankruptcy Court's subject matter jurisdiction extend[s] to claims against third party insurers arising from their insurance relationship with the debtor tortfeasor." *In re Johns-Manville Corp.*, 340 B.R. at 63.

The district court, like the bankruptcy court, determined that the Direct Action suits seek *indirect* recovery from the proceeds of the insurance policies as a result of personal injuries caused by Manville products. *Id.* at 67. To support its conclusion, the district court relied on the bankruptcy court's factual determinations that the "gravamen of these suits is that Travelers learned of asbestos risks from its [policy-based] defense of Manville in asbestos-related claims, and failed to disclose or otherwise suppressed this knowledge" and that "essentially all potential asbestos claimants—including all plaintiffs with Direct Action Claims—have been exposed to Manville asbestos." *Id.* at 63-64 (citing FOF ¶¶ 11, 73-88; 2004 WL 1876046, at *5, 18-20).

In our view, the jurisdictional analysis by the lower courts falls short for several reasons. In

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[18] Section 524(g)(4)(A)(ii) provides:

> [A]n injunction may bar any action directed against a third party who is identifiable from the terms of such injunction (by name or as part of an identifiable group) and is alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor to the extent such alleged liability of such third party arises by reason of . . . (III) the third party's provision of insurance to the debtor or a related party.

MacArthur, a Manville asbestos distributor ("MacArthur") sought a judicial declaration of coinsured status under "vendor endorsements" contained in Manville's policies. *MacArthur*, 837 F.2d at 90. This Court concluded that the 1986 orders prohibited MacArthur from calling on the endorsement for coverage after being sued for asbestos injuries caused by Manville products. *Id.* at 92-93. MacArthur insisted that its "vendor endorsement" claims were independent contractual claims against the non-debtor insurance companies that were therefore not within the jurisdictional reach of the 1986 orders. *Id.* at 92. We rejected that view, reasoning that the 1986 orders precluded suits against a significant asset of the bankruptcy estate—Manville's insurance policies[19]—and that MacArthur's coverage claim clearly affected that asset:

> The [vendor] endorsements are limited by the product liability limits of the underlying Manville policies and are otherwise subject to all of the terms of the underlying policies. [Plaintiff's] rights as an insured vendor are completely derivative of Manville's rights as the primary insured. . . . [Plaintiff] seek[s] to collect out of the proceeds of Manville's insurance policies on the basis of Manville's conduct. . . . [P]laintiff['s] claims are

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[19] Title 28 U.S.C. § 1334(e)(1) grants "[t]he district court in which a case under title 11 is commenced . . . exclusive jurisdiction . . . (1) of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate."

> inseparable from Manville's own insurance coverage and are consequently well within the Bankruptcy Court's jurisdiction over Manville's assets.

Id. at 92-93 (citation omitted). MacArthur's claim for defense and indemnification from the carrier would have reduced the amount of insurance available to satisfy claims against Manville. *Id.* at 92. Thus, MacArthur's claim for coverage was barred by the injunction and MacArthur was left to make a claim against the Manville Trust. *Id.* at 93-94.

The Fifth Circuit applied a similar analysis in *In re Davis*, 730 F.2d at 184. In *Davis*, 279 asbestos workers sued Travelers under a Louisiana statute that afforded injured persons "a right of direct action against the insurer within the terms and limits of the policy [that] may be brought against the insurer alone, or against both the insured and insurer jointly and in solido." La. Rev. Stat. § 22:655 (1984). The Louisiana direct action statute "does not create an independent cause of action against the insurer, it merely grants a procedural right of action against the insurer where the plaintiff has a substantive cause of action against the insured." *Descant v. Adm'rs of Tulane Educ. Fund*, 639 So. 2d 246, 249 (La. 1994); *see also Cacamo v. Liberty Mut. Fire Ins. Co.*, 764 So. 2d 41, 43 (La. 2000). While the workers' cases were pending, Johns-Manville filed its bankruptcy petition, triggering the provisions of an automatic stay. *In re Davis*, 730 F.2d at 178. The Fifth Circuit refused to vacate the stay for primarily the same reasons as those expressed by this Court in *MacArthur*. The Court noted that the

bankruptcy court had the authority to "enjoin litigants from pursuing actions pending in other courts that threaten the integrity of a bankrupt's estate" and that the insurance coverage served as a "bulwark against erosion of the estate." *Id.* at 184, 185.

The claims at issue in *MacArthur* and *Davis* differ significantly from the statutory and common law claims at issue here. Travelers candidly admits that both the statutory and common law claims seek damages from Travelers that are *unrelated* to the policy proceeds, quite unlike the claims in *MacArthur* and *Davis* where plaintiffs sought indemnification or compensation for the tortious wrongs of Manville to be paid out of the proceeds of Manville's insurance policies, *see MacArthur*, 837 F.2d at 92; *Davis*, 730 F.2d at 178. Moreover, the claims at issue here do not seek to collect on the basis of Manville's conduct. *Cf. MacArthur*, 837 F.2d at 92-93 ("[P]arties . . . seek to collect . . . on the basis of Manville's conduct."). Instead, the Plaintiffs seek to recover directly from Travelers, a non-debtor insurer, for its own alleged misconduct. (FOF ¶¶ 73-87; 2004 WL 1876046, at *18-20). Plaintiffs neither seek to recover insurance proceeds nor rely on the insurance policies for recovery.

The courts below appeared to view the jurisdictional inquiry as a factual one: if the direct actions "arose out of" or are "related to" the Manville-Travelers relationship, then the court had jurisdiction. But the factual determination was only half of the equation. The nature and extent of Travelers' duty to the Direct Action plaintiffs is a function of state law. Neither court

looked to the laws of the states where the claims arose to determine if indeed Travelers did have an independent legal duty in its dealing with plaintiffs, notwithstanding the factual background in which the duty arose.

For example, one group of statutory plaintiffs seeks "[d]amages for aggravation, inconvenience and frustration" based on Travelers' alleged violations of West Virginia's Unfair Trade Practices Act. *See* W. Va. Code § 33-11-4(9); Complaint in *Wise v. Travelers Indem. Co.*, No. 01-C-599 (W. Va. Cir. Ct., Berkeley County, Oct. 25, 2001) (Docket No. 3415, Ex. L), at 95. Although the West Virginia Unfair Trade Practices Act "itself does not provide for damages for a violation of its provisions," the Supreme Court of Appeals of West Virginia has "identified the type of damages recoverable under the Act as including attorney's fees and even punitive damages." *Wilt v. State Auto. Mut. Ins. Co.*, 506 S.E.2d. 608, 609 n.4, 610 (W. Va. 1998).[20] Moreover, it is clear under West

[20] The Clarifying Order also enjoins a number of actions filed in Massachusetts. Under Massachusetts law, a plaintiff may recover compensatory and punitive damages against an insurer under the Massachusetts Unfair Settlement Practices Act after settling with the underlying tortfeasor. *See Dattilo v. Arbella Mut. Ins. Co.*, No. 024510E, 2007 WL 1417870, at *1, 5-6 (Mass. Super. Ct. May 3, 2007) (citing *Columbia Chiropractic Group, Inc., v. Trust Ins. Co.*, 430 Mass. 60, 63 (1999) (attorney's fees incurred as a result of an insurer's wrongful failure to settle in violation of the Massachusetts unfair settlement practices act may be awarded as Mass. Gen. Law Chap. 93A damages and such amount may be subject to punitive damages)); *see also* Complaint in *Gilchrist v. Am. Standard, Inc.*, No. 03-508628 (Ohio Ct. Com. Pl.), at

Virginia law that settlement of the underlying tort case against the tortfeasor does not preclude a separate and independent recovery against the tortfeasor's insurer arising out of its alleged bad faith insurance practices. *See Poling v. Motorists Mut. Ins. Co.*, 450 S.E.2d 635, 636-37 (W. Va. 1994) (answering a certified question and determining that a cause of action for insurance bad faith under W. Va. Code § 33-11-4(9) is not precluded by the settlement of the underlying tort case against the tortfeasor). Thus, it is evident that Plaintiffs' Direct Action claims constitute independent tort actions.[21]

The importance of how a state defines these types of claims cannot be overlooked. For example, as noted above, the claims involving Louisiana law are premised on a statute that provides

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1-13, 101 (plaintiffs seek compensatory and punitive damages in relation to their common law claims for, *inter alia*, negligence, strict liability, and breach of express warranty).

[21] The parties have indicated that no court that has accepted the common law theories asserted in this case. *See* Brief of the State of Texas as Amicus Curiae, *In re St. Paul Fire & Marine Ins. Co.*, No. 01-06-00165-CV, 2006 WL 1403983, at *8 (Tex. Ct. App., filed Apr. 24, 2006) (citing *Bugg v. Am. Standard, Inc.*, No. 84829, 2005 WL 1245043 (Ohio Ct. App. May 26, 2005) (dismissing common law action for failure to state a claim); *Bope v. A.W. Chesterton Co.*, No. 85215, 2005 WL 2562913 (Ohio Ct. App. Oct. 13, 2005) (same); *In re Civil Action Welding Rod*, No. 531703 *et al.*, 2006 WL 397951 (Ohio Ct. Com. Pl. Feb. 15, 2006) (same)). We note, however, that the states' unwillingness to recognize these actions does not vest a federal court with jurisdiction to enjoin all such future claims.

a direct action against an insurer when the insured is insolvent. The recovery is against the policy and is thus limited to the coverage of the policy. *See* La. Rev. Stat. § 22:655(B)(1)(a)-(b). These were the type of claims in play in *Davis* and, in our view, *Davis* was correctly decided. To the extent the Clarifying Order limits claims based on that Louisiana statute the order is on sound jurisdictional ground.

However, the vast majority of the instant claims more closely resemble those at issue in *Matter of Zale Corp.*, 62 F.3d 746 (5th Cir. 1995). In *Zale*, the creditors' committee in Zale Corporation's ("Zale") bankruptcy planned to initiate tort and contract claims against Zale's officers and directors. *Id.* at 749-50. Cigna Insurance Company ("CIGNA") had issued Zale an insurance policy that provided primary coverage for Zale's officers and directors. *Id.* The National Union Fire Insurance Company ("NUFIC") had issued Zale an excess directors and officers liability policy, which provided coverage in excess of CIGNA's primary policy limits. *Id.* at 749 n.1. Eventually, various parties to the Zale bankruptcy filed a motion in the bankruptcy court seeking approval of a settlement agreement between Zale and CIGNA whereby certain Zale officers and directors would agree to a $32 million judgment to be satisfied solely out of insurance proceeds. *Id.* at 749. The bankruptcy court approved the settlement agreement, which included an injunction barring NUFIC from suing CIGNA for its actions relating to the settlement. *Id.* at 749-50. NUFIC challenged the injunction, insisting that its bad faith tort claims against CIGNA

did not "relate to" the bankruptcy for jurisdictional purposes because the claims were not property of the estate and had no effect on the estate. *Id.* at 755; *see* 28 U.S.C. § 1334(b) ("[T]he district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or *related to* cases under title 11." (emphasis added)).

The Fifth Circuit first observed that:

> Those cases in which courts have upheld "related to" jurisdiction over third-party actions do so because the subject of the third-party dispute is property of the estate, or because the dispute over the asset would have an effect on the estate. Conversely, courts have held that a third-party action does not create "related to" jurisdiction when the asset in question is not property of the estate and the dispute has no effect on the estate. Shared facts between the third-party action and a debtor-creditor conflict do not in and of themselves suffice to make the third-party action "related to" the bankruptcy. . . . [T]he district court's desire to "foster and encourage and then preserve settlement in federal court" does not in and of itself confer jurisdiction.

Zale, 62 F.3d at 753-54 (internal citations and footnotes omitted). The issue before the court was "not whether the bankruptcy court had jurisdiction over the settlement and CIGNA, but whether

the bankruptcy court had jurisdiction over an attempt to enjoin actions between . . . NUFIC and CIGNA." *Id.* at 755. The Fifth Circuit concluded that NUFIC's bad faith tort claims were beyond the jurisdictional reach of the bankruptcy court.

> Because CIGNA, [the directors], and NUFIC are not debtors and because the property at issue—the bad faith claims—is not property of the estate, the bankruptcy court would have no jurisdiction over the tort claims . . . . Moreover, the tort claims do not implicate an independent obligation of Zale in favor of CIGNA. . . . For these reasons, the settlement cannot provide the basis for jurisdiction over the bad faith claims. Accordingly, CIGNA and Zale's attempt to establish jurisdiction fails, and the bankruptcy court had no jurisdiction over . . . NUFIC's tort actions against CIGNA.

Id. at 756-57 (internal citations and footnotes omitted). The Fifth Circuit thus vacated the approval of the settlement between Zale and CIGNA. *Id.* at 766.

The fact that our case involves a clarification of the bankruptcy court's prior order does not alter the jurisdictional predicate necessary to enjoin third-party non-debtor claims.[22] Here, as in *Zale*,

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[22] The ancillary jurisdiction courts possess to enforce their own orders "is itself limited by the jurisdictional limits of the order sought to be enforced." *In re Fairchild Aircraft Corp.*, 184 B.R. 910, 916 (Bankr. W.D. Tex. 1995) (citing *Zerand-Bernal Group, Inc. v. Cox*, 23 F.3d 159, 163 (7th Cir. 1994); *Matter of Mooney Aircraft, Inc.*, 730 F.2d 367,

Plaintiffs seek to recover directly from a debtor's insurer for the insurer's own independent wrongdoing. (FOF ¶¶ 73-87; 2004 WL 1876046, at *18-20). Plaintiffs aim to pursue the assets of Travelers. They raise no claim against Manville's insurance coverage. They make no claim against an asset of the bankruptcy estate, nor do their actions affect the estate. The bankruptcy court had no jurisdiction to enjoin the Direct Action claims against Travelers.[23]

374-75 (5th Cir. 1984)), *vacated on other grounds*, 220 B.R. 909 (Bankr. W.D. Tex. 1998).

[23] *See also In re Elsinore Shore Assocs.*, 91 B.R. 238, 253-54 (Bankr. D. N.J. 1988) (rejecting debtors' proposed Chapter 11 reorganization plan that improperly called for creditors to release their claims against third-party nondebtors):

> [The debtor] contends that if a bankruptcy court has the power to enjoin suits against nondebtor third parties, as in [*MacArthur*], it has the power to order the release of claims. Such an interpretation and extension of the Second Circuit's holding is inappropriate. The bankruptcy court in [*MacArthur*] was dealing with claims against property of the estate . . . which are subject to the court's jurisdiction. . . . To extend the holding in [*MacArthur*] to this situation is based on neither law or logic. This court may properly invoke its jurisdiction over creditors of [the debtor] when these creditors' actions may effect property of the estate. However, for this court to delve into the rights of these creditors against third parties not before this court is an over-extension of this court's jurisdiction.

Id. at 253-54 (internal citations omitted).

II

The district court emphasized the bankruptcy court's declaration that its "repeated use of the term[s] 'arising out of' and 'related to' [was] not gratuitous or superfluous; they were meant to provide . . . global finality for Travelers . . . ." *In re Johns-Manville Corp.*, 340 B.R. at 60. But global finality is only as "global" as the bankruptcy court's jurisdiction. A court's ability to provide finality to a third-party is defined by its jurisdiction, not its good intentions. We have previously recognized that "a nondebtor release is a device that lends itself to abuse. By it, a nondebtor can shield itself from liability to third parties. In form, it is a release; in effect, it may operate as a bankruptcy discharge arranged without a filing and without the safeguards of the Code." *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 142 (2d Cir. 2005). In finding it reasonable to broadly interpret the 1986 orders to enjoin the statutory and common law actions, the district court relied on the bankruptcy court's conclusion of law that "insurers would not contribute funds [to the Manville Trust] without receiving assurances that any liabilities arising from or relating to their insurance relationships with Manville would be fully and finally resolved." *In re Johns-Manville Corp.*, 340 B.R. at 61 (citing COL ¶ 20; 2004 WL 1876046, at *30) (alteration in original). It is, however, "precisely this conditioning of financial participation by non-debtors on releases that is subject to the sort of abuse foreseen" in *Metromedia*. *In re Karta Corp.*, 342 B.R. 45, 55 (S.D.N.Y. 2006). Although the bankruptcy court had jurisdiction and authority to enter the

1986 orders barring claims "based upon, arising out of or related to the Policies," (Insurance Settlement Order at 165, ¶ 23.1), it erred by subsequently interpreting those terms without reference to the court's jurisdictional limits.

It was inappropriate for the bankruptcy court to enjoin claims brought against a third-party non-debtor solely on the basis of that third-party's financial contribution to a debtor's estate. If that were possible

> a debtor could create subject matter jurisdiction over any non-debtor third-party by structuring a plan in such a way that it depended upon third-party contributions. As we have made clear, subject matter jurisdiction cannot be conferred by consent of the parties. Where a court lacks subject matter jurisdiction over a dispute, the parties cannot create it by agreement even in a plan of reorganization.

In re Combustion Eng'g, Inc., 391 F.3d 190, 228 (3d Cir. 2004) (citation and quotation marks omitted).

Instead, a bankruptcy court only has jurisdiction to enjoin third-party non-debtor claims that directly affect the *res* of the bankruptcy estate. In *MacArthur* we recognized that conclusion as the decisional pivot for both *MacArthur* and *Davis*. "[I]n both instances, third parties seek to collect out of the *proceeds* of Manville's insurance policies on the basis of Manville's conduct. . . . [P]laintiffs' claims are inseparable from Manville's own insurance coverage and are consequently well within the Bankruptcy Court's

jurisdiction over Manville's assets." *MacArthur*, 837 F.2d at 92-93 (emphasis added).

The district court made particular note of the bankruptcy court's extensive factual findings regarding Manville's dominating presence in the asbestos industry, (FOF ¶¶ 1-11; 2004 WL 1876046, at *1-5), and its thirty-year involvement with Travelers, (FOF ¶¶ 12-50; 2004 WL 1876046, at *5-13). *In re Johns-Manville Corp.*, 340 B.R. at 64. The court embraced the bankruptcy court's factual findings that "Travelers learned virtually everything it knew about asbestos from its relationship with Manville" and that "the Direct Action Claims against Travelers 'inescapably' relate to its insurance relationship with Manville." *Id.* (quoting (FOF ¶¶ 49-50; 2004 WL 1876046, at *13)). There is no doubt that these findings by the bankruptcy court document the *factual* origins of Travelers' alleged malfeasance. The factual findings are, however, only part of the liability equation. What remained was a legal determination: did Travelers owe a duty to the Direct Action Plaintiffs independent of its contractual obligations to indemnify those injured by the tortious conduct of Manville? If such a duty exists, then the fact that it arises from a common nucleus of operative facts involving Travelers and Manville (*e.g.*, the Manville/ Travelers insurance relationship) is of little significance from a jurisdictional standpoint. As noted above, drawing the duty line is a function of state and not federal law. *See, e.g.*, *Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 232-40 (2001).

There is little doubt that, in a literal sense, the instant claims against Travelers "arise out of" its provision of insurance coverage to Manville. The bankruptcy court's extensive factual findings regarding Manville's all-encompassing presence in the asbestos industry and its extensive relationship with Travelers support this notion. (FOF ¶¶ 1-50; 2004 WL 1876046, at *1-13). However, the 1986 orders must be read to conform with the bankruptcy court's jurisdiction over the *res* of the Manville estate.[24] Interpreting the orders otherwise risks federal bankruptcy courts "displac[ing] state courts for large categories of disputes in which some[one] . . . may be bankrupt." *Matter of Zale Corp.*, 62 F.3d at 755 (quoting *In re Kubly*, 818 F.2d 643, 645 (7th Cir. 1987)) (second alteration in original).

Section 524(g), enacted in response to the bankruptcy court's actions in earlier proceedings in this case, must be interpreted in the same manner. The legislation provides a unique form of supplemental injunctive relief for an insolvent debtor confronting the particularized problems and complexities associated with asbestos liabil-

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[24] A bankruptcy court is clearly without power to enjoin all claims that literally "arise out of" the insurance policies that Manville purchased from Travelers. Suppose, for example, that a plaintiff sued Travelers for suppressing information about the dangers of asbestos in relation to a policy it issued to another asbestos manufacturer. Although the knowledge that Travelers failed to disclose may have "arisen out of" its relationship with Manville, allowing a bankruptcy court to bar such claims because they literally "arise out of" that relationship would embody the abuse foreseen by this Court in *Metromedia*, 416 F.3d at 142.

ity. *See, e.g.*, H.R. Rep. 103-835, at 40, *as reprinted in* 1994 U.S.C.C.A.N. 3340, 3348; *see also In re Combustion Eng'g, Inc.*, 391 F.3d at 234. Section 524(g) mandates the channeling of related claims to a personal injury trust, thereby relieving the debtor of the uncertainty of future asbestos liabilities and helping to achieve the purpose of Chapter 11 by facilitating the reorganization and rehabilitation of the debtor as an economically viable entity. *Id.* Section 524(g)(4)(A)(ii)(III) provides:

> Notwithstanding the provisions of section 524(e),[25] such an injunction may bar any action directed against a third party who is identifiable from the terms of such injunction (by name or as part of an identifiable group) and is alleged to be *directly or indirectly liable for the conduct of, claims against, or demands on the debtor to the extent such alleged liability of such third parties arises by reason of* . . . (III) the third party's provision of insurance to the debtor . . . .

Id. (emphasis added).

The application of a § 524 injunction is limited to "situations where a channeling injunction may enjoin actions against third parties to those where a third party has derivative liability for the claims against the debtor." *In re Combustion Eng'g, Inc.*, 391 F.3d at 234. The Third Circuit

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[25] Title 11 U.S.C. § 524(e) provides that "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt."

has noted that § 524(g)(4)(A)(ii) is consistent with the purposes underlying § 524(g):

> The channeling injunction issued in the Johns-Manville bankruptcy, after which § 524(g) was modeled, *see* 140 Cong. Rec. H10752, H10765 (1994) . . . was limited to third-party actions against non-debtors in which the liability alleged was derivative of the debtor. *See MacArthur Co. v. Johns-Manville*, 837 F.2d 92-93 (2d Cir. 1988) (explaining that the channeling injunction applied only to third parties [who] seek to collect out of the proceeds of Manville's insurance policies on the basis of Manville's conduct).

Id. at 235 n.47 (citations and internal quotation marks omitted). As discussed above, the claims at issue here, unlike those in *Davis* and *MacArthur*, are not derivative of Manville's liability, but rather seek to recover directly from Travelers for its own alleged misconduct. While Congress enacted § 524(g) to reflect the injunction/channeling mechanism that the Manville bankruptcy court developed in response to various derivative claims, the provision was not intended to reach non-derivative claims. Because the claims here are non-derivative and have no effect on the *res*, they are outside the limits of § 524(g).

Conclusion

In our view, the district court lacked subject matter jurisdiction to enjoin claims against Travelers that were predicated, as a matter of state law, on Travelers' own alleged misconduct

and were unrelated to Manville's insurance policy proceeds and the *res* of the Manville estate. The irony in all of this is that while the Direct Actions, with one categorical exception, involve a claim of an independent duty on the part of Travelers, they have met with almost universal failure in the state courts. Thus, while the bankruptcy court's order sought to achieve one-stop relief for Travelers that could be seen as well deserved, it seems to us there is not one but many courthouses where the legitimacy of these actions must be tested. The bankruptcy court's desire to facilitate global finality for Travelers may not be used as a jurisdictional bootstrap when no jurisdiction otherwise exists. The order of the district court is VACATED and the case REMANDED for the bankruptcy court to examine whether, in light of this opinion, it had jurisdiction to enjoin any of the instant claims.[26]

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[26] Travelers asserts that if any portion of the bankruptcy court's clarifying order is vacated then all of the relevant settlements will terminate. We offer no opinion on this matter and leave it to the parties, with the aid of the bankruptcy court, to determine the status of their settlements.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 04 Civ. 8001(JGK)
March 28, 2006

In re JOHNS-MANVILLE CORP., *et al.*,

Debtors.

Order was entered by the Bankruptcy Court, Burton R. Lifland, J., approving postconfirmation settlement agreements and clarifying scope of bar order previously entered in connection with confirmation of Chapter 11 plan of bankrupt manufacturer of asbestos products. Non-settling insurers appealed.

The District Court, Koeltl, J., held that:

(1) non-settling insurers had standing to appeal;

(2) injunctive provision incorporated in previous order of bankruptcy court confirming debtor's proposed plan was broad enough to cover direct actions suits and related contribution and indemnification claims by insurers;

(3) bankruptcy court had jurisdiction over liability policies purchased by debtor,

and to protect those policies from being dissipated by direct action claims against the issuing insurer, by broadly enjoining such claims and channeling them into trust established under debtor's plan;

(4) court had no jurisdiction to enter "gatekeeping" order, to require third parties wishing to sue debtor's insurer to first obtain determination from bankruptcy court that their claims were unrelated to policies that insurer had issued to debtor; and

(5) decision to approve proposed settlement was not clear abuse of discretion.

Affirmed in part and vacated in part.

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Andrew Tyler Frankel, Barry Robert Ostrager, M.O. Sigal, Jr., Simpson Thacher & Bartlett LLP, Bonnie K. Steingart, Fried, Frank, Harris, Shriver & Jacobson, New York, NY, Robert Jerrod Pfister, Simpson Thacher & Bartlett LLP, Los Angeles, CA, Karen A. Giannelli, Gibbons, Del Deo, Griffinger & Vecchione, P.C., Gibbons,

Del Deo, Griffinger & Vecchione, P.C., Newark, NJ, Ronald Barliant, Goldberg, Kohn, Bell, Black, Rosenbloom & Moritz, Ltd., Chicago, IL, for Appellees.

OPINION & ORDER

KOELTL, District Judge.

This case relates to the bankruptcy of Johns-Manville Corporation ("Manville"), the world's largest supplier of asbestos. Under pressure from asbestos litigation, Manville filed for bankruptcy in August 1982 in the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court"). Since Manville's bankruptcy filing, asbestos plaintiffs have also tried to sue insurers of Manville, including Travelers Indemnity Company, Travelers Casualty and Surety Company, and their related entities (collectively, "Travelers"), who together were Manville's primary insurer. As part of Manville's reorganization plan, the Bankruptcy Court (Lifland, *Bankruptcy J.*) issued in 1986 an injunction that barred suits against Manville's insurers—including Travelers—and directed litigation by potential claimants instead against the Manville Personal Injury Settlement Trust. (Order Confirming Debtors' Second Amended and Restated Plan of Reorganization, dated Dec. 22, 1986 (Docket No. 3414) ("Confirmation Order").)

However, various groups of plaintiffs have since filed direct actions against Travelers and other insurers (the "Direct Action Suits"), arguing that the insurers had primary liability to

claimants because they misled potential claimants about the dangers of asbestos. These suits were brought under the statutory law of various states, including Hawaii, and under the common law. Three classes of plaintiffs thereafter settled with Travelers: the "Statutory Direct Action Plaintiffs," the "Hawaii Plaintiffs," and the "Common Law Plaintiffs" (collectively, the "Plaintiff Appellees"). The Bankruptcy Court granted Travelers' motion to approve the settlements.

In conjunction with the settlements—which totaled almost $500 million—and after an evidentiary hearing, the Bankruptcy Court issued a "Clarifying Order" on August 17, 2004 that made it plain that the Direct Action Suits against Travelers were barred by the original 1986 injunction, and barred further lawsuits against Travelers, including any claims for contribution or indemnity. (Order Approving Settlement of the Statutory, Hawaii and Common Law Direct Actions and Clarifying Confirmation Order, Including Insurance Settlement Order and Channeling Injunction, dated Aug. 17, 2004 (Docket No. 3751) ("Clarifying Order"), at ¶¶ 6-8, 10.) The Clarifying Order also included a judgment reduction provision that reduced the judgment obtained in Direct Action Suits against any objecting insurer by the greater of either a) the amount that the relevant plaintiff received in the settlement, or b) the amount that the non-settling insurer would have been entitled to obtain from Travelers in contribution or indemnity, had Travelers been a party to the litigation. The Bankruptcy Court supported its actions with its

Findings of Fact and Conclusions of Law Regarding Travelers Motions for Approval of Certain Settlement Agreements and for the Entry of a Clarifying Order, dated August 17, 2004 (Docket No. 3750), *available at* 2004 WL 1876046 (cited herein as "FOF" or "COL," or together, as the "Bankruptcy Court's Findings").

Continental Casualty Company ("Continental"), Chubb Indemnity Insurance Company ("Chubb"), and OneBeacon America Insurance Company ("OneBeacon") (collectively, the "Objecting Insurers") are other insurers who have objected to the settlement and have appealed from the Bankruptcy Court's Findings and Clarifying Order. Certain asbestos claimants ("Objecting Claimants") also have objected to the settlement and have appealed.[1] The appellants challenge, among other things, the subject matter jurisdiction of the Bankruptcy Court over Direct Action Suits against Travelers, a non-debtor. In turn, the Plaintiff Appellees have moved to dismiss the Objecting Insurers' appeals on the grounds of lack of standing.

I.

The facts in this case, catalogued in detail in the Bankruptcy Court's Findings of Fact, are as follows.

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[1] The Objecting Claimants identify themselves as the "Asbestos Personal Injury Plaintiffs," who are six individual claimants, and the "Cascino Asbestos Claimants," who are represented by Michael Cascino, Esq. (Objecting Claimants Brief at 1, nn. 1 and 2.)

A.

Manville was the world's largest producer of asbestos. (FOF at ¶ 3; 2004 WL 1876046, at *2.) Faced with overwhelming asbestos-related litigation, on August 26, 1982 Manville filed a voluntary petition for reorganization under chapter 11 of the United States Bankruptcy Code, 11 U.S.C. §§ 1101 *et seq.* Four years later, on December 22, 1986, the Bankruptcy Court entered an order confirming Manville's Second Amended and Restated Plan of Reorganization (the "Plan"), which established the Manville Personal Injury Settlement Trust ("Manville Trust") to pay personal injury claims arising from exposure to asbestos. *See Kane v. Johns-Manville Corp.*, 843 F.2d 636, 640-41 (2d Cir.1988) (describing the Plan, which was upheld on appeal). This Confirmation Order also incorporated by reference provisions from an insurance settlement order previously issued by the Bankruptcy Court on December 18, 2006 ("Insurance Settlement Order"), which enjoined insurance policy-related litigation against certain insurers of Manville, including Travelers. (FOF ¶¶ 61-63; 2004 WL 1876046, at *15-16.)

Travelers was Manville's primary insurer from 1947 through 1976, providing comprehensive general liability coverage and other insurance policies. *See In re Johns-Manville Corp.*, 33 B.R. 254, 260-61 (Bankr.S.D.N.Y.1983). Over the course of the Manville insurance relationship, Travelers investigated asbestos claims, funded litigation defense efforts, and learned about the risks of asbestos. After reviewing considerable

testimony and evidence of Travelers' involvement in Manville's asbestos cases, the Bankruptcy Court concluded as a factual matter that "Travelers learned virtually everything it knew about asbestos from its relationship with Manville." (FOF ¶ 50; 2004 WL 1876046, at *13.) While other Travelers policyholders also faced asbestos litigation, the Bankruptcy Court rejected allegations from other parties that Travelers learned of any asbestos risks from other sources that it did not already know from the Manville relationship. (*See* Complaint in *Wise v. Travelers Indem. Co.*, No. 01-C-599 (W. Va. Cir. Ct., Berkely County) (Docket No. 3415, Ex. L), at ¶¶ 79-110 (a Direct Action Suit alleging Travelers' knowledge from other sources).)

Soon after Manville filed for bankruptcy, Travelers and other Manville insurers became enmeshed in so-called "direct action" suits by asbestos plaintiffs. Manville factory workers sued Travelers pursuant to the Louisiana Direct Action Statute, La R.S. 22:655. (FOF ¶ 55; 2004 WL 1876046, at *14, citing *Wedgeworth v. Fibreboard Corp.*, 706 F.2d 541, 546-48 (5th Cir.1983) (discussing direct action claims against Manville's insurers).) Travelers also faced claims from vendors of Manville products, who claimed that Travelers owed duties arising out of its insurance policies and relationship with Manville. (FOF ¶ 56; 2004 WL 1876046, at *14, citing *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 90-91 (2d Cir.1988) (discussing one such claim).) There were also a host of contribution claims, cross claims, and indemnity claims between and among virtually every company that

had insured Manville in its long history. (FOF ¶ 57; 2004 WL 1876046, at *15.) Finally, Travelers and the other insurers were embroiled in a contentious coverage dispute with Manville.

The Insurance Settlement Order, considered the "cornerstone" of the Manville reorganization, involved Travelers contributing nearly $80 million to the bankruptcy estate in exchange for an injunction that channeled all claims related to policy claims to the Manville Trust and a complete release for Travelers of liabilities that were related to or based on Manville. (FOF ¶¶ 58-61; 2004 WL 1876046, at *15.) With the Insurance Settlement Order and the Confirmation Order (together, the "1986 Orders"), Travelers thought it had secured finality and a full and complete release of liabilities related to Manville.

B.

Nonetheless, various groups of plaintiffs afterwards filed the Direct Action Suits against Travelers (as well as other Manville insurers). The Statutory Direct Action Plaintiffs filed suit in various states, including Hawaii, alleging that Travelers conspired to violate state laws prohibiting unfair insurance trade and settlement practices. They also allege that Travelers was responsible for coordination of the national defense effort against asbestos litigation and its allegedly fraudulent perpetuation of the "state of the art" defense. (*Id.* at ¶¶ 73-79; 2004 WL 1876046, at *18-19.) The Common Law Plaintiffs allege that Travelers violated certain common law duties to them when it failed to disclose what

it had learned about asbestos hazards from Manville, and that Travelers conspired with Manville and other insurers to suppress such knowledge. (*Id.* at ¶¶ 80-88; 2004 WL 1876046, at *18-19.)

On June 19, 2002, Travelers moved the Bankruptcy Court to enjoin these suits pursuant to the 1986 Orders. The Bankruptcy Court issued a temporary restraining order prohibiting further prosecution of certain lawsuits against Travelers, and this order was subsequently extended in scope and duration. (*Id.* at 1; 2004 WL 1876046, at *1.) The Bankruptcy Court held a series of hearings on the motion, and on August 1, 2002 referred the matter to mediation and appointed the Honorable Mario M. Cuomo, former Governor of the State of New York, as mediator. The result of the mediation was that in November 2003, Travelers entered into a settlement agreement with the Statutory Direct Action Plaintiffs pursuant to which Travelers agreed to pay $360 million. (*Id.* at ¶ 96; 2004 WL 1876046, at *22.) In May 2004, Travelers settled with the Common Law Plaintiffs for $70 million, and settled with the Hawaii Plaintiffs for $15 million. (*Id.* at ¶¶ 101, 105; 2004 WL 1876046, at *22-23.) The settlements provided for the creation of separate funds to compensate the plaintiffs in each of the respective classes. (*Id.* at ¶¶ 98, 102, 105; 2004 WL 1876046, at *22-23.) These settlements were conditioned upon the entry of an order by the Bankruptcy Court to clarify that the Direct Action Suits were always prohibited by the 1986 Orders.

Continental, Chubb, OneBeacon, and the Objecting Claimants filed objections to the approval of these settlements in the Bankruptcy Court. Continental, a Manville insurer that was also sued in the Direct Action Suits, argued that the Bankruptcy Court did not have subject matter jurisdiction to bar its contribution and indemnification claims against Travelers. Chubb, a non-Manville insurer also sued in Direct Action Suits, similarly objected. OneBeacon, one of the Manville insurers who settled in 1986 and who was allegedly covered by the 1986 Orders, argued that the injunction should protect it from Direct Action Suits as well. The Objecting Claimants complained of defects in the settlement with the Common Law Plaintiffs.

The Bankruptcy Court held an evidentiary hearing on the proposed settlements on July 6, 2004, and issued the Clarifying Order and the Bankruptcy Court's Findings on August 17, 2004. These appeals followed.

II.

The Court first addresses the Plaintiff Appellees' motions to dismiss the appeals of Continental, Chubb, and OneBeacon for lack of standing. The Plaintiff Appellees essentially argue that because the Objecting Insurers are protected by the judgment reduction provision, they suffer no injury from the Clarifying Order, and thus have no standing to appeal.

The appellants bear the burden of demonstrating that they have standing. *In re School Asbestos Litig.*, 921 F.2d 1330, 1332 (3d Cir.

1990). "To establish standing to appeal a settlement, a non-settling defendant may not merely claim an interest in the lawsuit but must show some cognizable prejudice to a legal relationship between it and the settling parties." *Id.* The appellant must be a "person aggrieved"—"a person directly and adversely affected pecuniarily by the challenged order of the bankruptcy court." *Int'l Trade Admin. v. Rensselaer Polytechnic Institute*, 936 F.2d 744, 747 (2d Cir.1991) (internal citation and quotation marks omitted); *see also In re Combustion Engineering, Inc.*, 391 F.3d 190, 214 (3d Cir.2004); *In re PWS Holding Corp.*, 228 F.3d 224, 248 (3d Cir.2000). The "person aggrieved" standard is more stringent than the constitutional test for standing. *Combustion Engineering*, 391 F.3d at 215; *PWS Holding*, 228 F.3d at 248.

The Plaintiff Appellees argue that the Objecting Insurers have failed to show that they are "persons aggrieved" by the Clarifying Order, because even if the insurers' potential contribution or indemnity actions against Travelers are barred, the judgment reduction provision protects the insurers' interests.[2] The Plaintiff

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[2] The relevant judgment reduction provision in Paragraph 14 of the Clarifying Order states:

> Any judgment obtained against . . . any objecting insurer . . . regardless of whether such Insurer was a settling Manville insurer, with respect to any claim asserted in any lawsuit that is enjoined as to Travelers and not enjoined as to said Insurer shall be reduced by the greater of: (a) the amount (if any) the Claimant has recovered or is entitled to recover from the Statutory Direct Action Settlement Fund and/or the Hawaii Direct Action Settlement Fund and/or the Common Law Direct Action Settlement Fund to the

Appellees contend that this judgment reduction provision is similar to the one in *School Asbestos*, where the Third Circuit Court of Appeals held that appellants did not have standing to challenge a settlement that "recognizes the existence of indemnification and contribution rights of non-settling defendants and the Order approving the settlement contains no ruling purporting to limit any claims non-settling defendants may have." *School Asbestos*, 921 F.2d at 1333. The Plaintiff Appellees also rely on *Zupnick v. Fogel*, 989 F.2d 93 (2d Cir.1993), which rejected standing to challenge a settlement with a judgment reduction provision, but that case is inapplicable because that settlement agreement was not binding on the non-settling defendants. *Id.* at 99.

Neither the settlements in *School Asbestos* nor *Zupnick* included a bar order extinguishing the non-settling defendants' indemnification and contribution rights, which the Third Circuit Court of Appeals later ruled did create a "cognizable prejudice" that permitted standing to appeal a settlement. *Eichenholtz v. Brennan*, 52 F.3d 478, 482-83 (3d Cir.1995); *see also In re Orthopedic Bone Screw Products Liability Litig.*, MDL No. 1014, 1997 WL 164237, at *4 (E.D.Pa. March 26, 1997) (finding standing to challenge a settlement

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extent that the Insurer is entitled to such a reduction for that amount under the applicable state law; or (b) to the extent permitted under applicable state law, the amount or percentage (up to 100%) that the Insurer would have been able to recover from Travelers, whether by contribution, indemnity or otherwise under applicable state law, had Travelers been joined in said lawsuit and/or sued for indemnity and/or contribution in a separate lawsuit.

that included a bar order and a judgment reduction provision, and distinguishing *School Asbestos* as not containing a bar order).

The Plaintiff Appellees also cite several other cases upholding settlements that contain bar orders and judgment reduction provisions, but these cases did not involve a challenge to the appellants' standing. *See, e.g., Gerber v. MTC Electronic Technologies Co., Ltd.*, 329 F.3d 297, 306 (2d Cir.2003) (finding that "judgment credit adequately compensates the non-settling defendants for their indemnity and contribution claims"); *In re Worldcom, Inc. ERISA Litig.*, 339 F.Supp.2d 561, 568 (S.D.N.Y.2004) (noting that courts may approve settlement with bar orders as long as there is a proper set-off provision). Other cases cited by the parties rejected on the merits settlements with bar orders and judgment reduction provisions because non-settling defendants were not adequately compensated for the bar against contribution and indemnification claims. *See, e.g., In re Masters Mates & Pilots Pension Plan and IRAP Litig.*, 957 F.2d 1020, 1032-33 (2d Cir.1992); *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 161 (4th Cir.1991).

These cases demonstrate that the question of whether a judgment reduction provision compensates for a bar order against contribution and indemnification claims is a question on the merits of the settlement, and not an issue of standing. *Cf. Feld v. Zale Corp.* (*In re Zale Corp.*), 62 F.3d 746, 751 n. 13 (5th Cir.1995) ("[T]he fact that the injunction bars NUFIC and Feld in any way gives them standing to appeal it."). For example, in *Eichenholtz,* the Court of Appeals

found that non-settling defendants had standing to appeal, even though it ultimately found on the merits that the judgment reduction provision adequately compensated for the bar order. *Eichenholtz*, 52 F.3d at 483, 487.

The Ninth Circuit Court of Appeals interpreted *School Asbestos* and *Zupnick* as holding that it is possible that "a judgment reduction credit may divest non-settling defendants of standing if it is written in such a way as to ameliorate any harm caused by other provisions in the settlement agreement." *Smith v. Arthur Andersen LLP*, 421 F.3d 989, 1000 (9th Cir.2005). But *Smith* also recognized that measuring any alleged harm from an inadequate judgment reduction provision was still a question of merits, and that standing may be accepted by considering the appellants' allegations of the provision's inadequacy on their face. *Id.* at 1001 ("We are not reviewing an order entering summary judgment or dismissing a complaint, where a more searching inquiry into the factual and legal basis of a claim might be productive."). In *Smith*, the Court of Appeals found standing to challenge a bar order despite a judgment reduction provision because the appellants alleged the provision failed to compensate for the elimination of " 'indemnity or other [ ]' claims." *Id.* The Court of Appeals noted that the fact that appellants "have not articulated the precise nature of the 'indemnity or other [ ]' claims they are barred from asserting does not demonstrate a lack of formal legal prejudice." *Id.*

Here, the Objecting Insurers raise several arguments concerning why the judgment reduction provision in the Clarifying Order is inade-

quate to compensate for the bar order. Among other things, the Objecting Insurers argue that the Clarifying Order is potentially unenforceable, would fail to provide the appropriate set-off in certain jurisdictions, and limits their ability to obtain necessary discovery against Travelers. While the Plaintiff Appellees dispute these claims, such arguments go to the merits of the appeal, and not to the question of standing.[3]

The motions to dismiss the appeals are denied.

III.

The Court next addresses the merits of the various appeals. Continental, Chubb, OneBeacon, and the Objecting Claimants appeal from the Bankruptcy Court's Findings (Docket No. 3750) and the Clarifying Order approving the Traveler's settlement (Docket No. 3751). The Court reviews conclusions of law by the Bankruptcy Court *de novo*, but accepts the Bankruptcy Court's findings of facts unless "clearly erroneous." *See* Fed. R. Bankr.P. 8013; *In re Halstead Energy Corp.*, 367 F.3d 110, 114 (2d Cir.2004).

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[3] OneBeacon makes the separate argument that it has standing to appeal the Clarifying Order based on the Order's failure to provide similar protection for OneBeacon from Direct Action Suits. Chubb makes the separate argument that it has standing to challenge the order purporting to clarify the 1986 injunction because it never had the opportunity to challenge the original injunction. Because the Court finds that all the Objecting Insurers have standing because of alleged cognizable prejudice from the bar order, the Court need not address these separate arguments for standing purposes.

A.

Appellants Continental, Chubb, and the Objecting Claimants argue that the Bankruptcy Court did not have subject matter jurisdiction to issue its injunction barring suits against Travelers in the Clarifying Order. A bankruptcy court's subject matter jurisdiction is limited to controversies "arising under title 11 or arising in or related to a case under title 11." 28 U.S.C. § 157(a); *see also* 28 U.S.C. § 1334(b).

As an initial clarification, the Objecting Claimants incorrectly argue that there can be no "related to" jurisdiction for the 2004 Clarifying Order, because post-confirmation, there was no longer a Manville bankruptcy estate for the dispute to "relate to." (Objecting Claimants Brief at 15-16, citing *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d Cir.1984).) However, neither the Bankruptcy Court nor the appellees invoke "related to" jurisdiction as a basis for the Clarifying Order. Instead, the Bankruptcy Court held that it was "enforcing its own Orders and thus its jurisdiction is derivative of the original jurisdiction" of the previous 1986 Orders. (COL ¶ 8; 2004 WL 1876046, at *28.) "A bankruptcy court retains post-confirmation jurisdiction to interpret and enforce its own orders, particularly when disputes arise over a bankruptcy plan of reorganization." *In re Petrie Retail, Inc.*, 304 F.3d 223, 230 (2d Cir.2002). In confirming the Plan, the Bankruptcy Court explicitly retained jurisdiction to enforce its orders and injunctions. (Confirmation Order ¶ 28.) The Objecting Claimants' argument notwithstanding, the parties agree

that the Bankruptcy Court had subject matter jurisdiction to interpret and enforce the 1986 Orders. (Tr. of Feb. 22, 2006 hearing, at 22.)

Thus, the gravamen of the appellants' challenge to subject matter jurisdiction is that the injunction in the Clarifying Order is broader than the 1986 Orders, and that, even if the 1986 Orders contemplated Direct Action Suits, the Bankruptcy Court had no jurisdiction in 1986 to bar such suits. This challenge raises three issues. First, the Court must determine whether the Bankruptcy Court's conclusion of law that the Direct Action Suits violated the 1986 Orders was correct. Second, the Court must determine whether the Bankruptcy Court had subject matter jurisdiction in 1986 to enjoin Direct Action Suits. Third, if jurisdiction is established, the Court must determine its scope with respect to approving settlements, imposing "gate-keeping" requirements, and enjoining Direct Actions Suits not involving Manville.

1.

The first issue is whether the Bankruptcy Court correctly concluded that the Direct Actions Suits and any related contribution and indemnification claims were covered by the 1986 Orders.[4] (*See* COL ¶¶ 25-35; 2004 WL 1876046, at

[4] The parties dispute which standard of review to use to evaluate the Bankruptcy Court's conclusion. The appellees argue that a judge's interpretation of the judge's own order is accorded deference and "will not be disturbed 'absent a clear abuse of discretion.'" *Truskoski v. ESPN, Inc.*, 60 F.3d 74, 77 (2d Cir.1995) (per curiam) (citation omit

*32-34.) The Bankruptcy Court found that the Direct Action Suits violated the Insurance Settlement Order, which was incorporated into the Confirmation Order.[5] The relevant provision of the Insurance Settlement Order provided:

> [A]ll Persons are permanently restrained and enjoined from commencing and/or continuing *any suit, arbitration or other proceeding of any type or nature* for Policy Claims against any or all members of the Settling Insurer

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ted, also noting that it is "peculiarly within the province of the district court . . . to determine the meaning of its own order"). The appellants counter that the Bankruptcy Court's interpretation of its own Confirmation Order should not be given such weight, because the "Bankruptcy Court's interpretation of the text of the Plan, the Confirmation Order, and the Final Decree are conclusions of law reviewed *de novo*." *In re Duplan Corp.*, 212 F.3d 144, 151 (2d Cir.2000) (citing *Bellefonte Reins. Co. v. Aetna Cas. and Sur. Co.*, 903 F.2d 910, 912 (2d Cir.1990) ("The proper standard for appellate review of a pure textual construction by the district court, whatever the procedural posture of the case, is *de novo*."). It is unnecessary to resolve this dispute because the clear language of the 1986 Orders supports the Bankruptcy Court's conclusion even under *de novo* review.

[5] The Objecting Claimants argue that the relevant injunction language from the Insurance Settlement Order was not incorporated in the Confirmation Order, and was thus abandoned. This argument has no merit. As the Bankruptcy Court concluded in its Findings of Fact, the Insurance Settlement Order was specifically incorporated in Paragraph (gg) of the Confirmation Order. (FOF ¶ 63; 2004 WL 1876046, at *16.) Moreover, the Second Circuit Court of Appeals, in upholding the very same injunction in *MacArthur*, cited the language from the Insurance Settlement Order as being in effect. *MacArthur*, 837 F.2d at 91.

> Group [which includes Travelers Indemnity Company and its affiliates] . . . .

(Insurance Settlement Order dated Dec. 16, 1986, at 172, ¶ 23.2(F) (emphasis added), attached as Exhibit D to Docket No. 3414.) The same Order defines "Policy Claims" broadly as:

> any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be, asserted by any Person against any or all members of the JM Group or against any or all members of the Settling Insurer Group *based upon, arising out of or relating to any or all of the [insurance policies].*

(Insurance Settlement Order at 165, ¶ 23.1 (emphasis added).) Given the broad language used in the order to describe barred suits—all suits "based upon, arising out of or relating to any or all" of the insurance policies—a plain reading shows that this would include the Direct Action Suits. As the Bankruptcy Court concluded: "The Court's repeated use of the term 'arising out of' and 'related to' were not gratuitous or superfluous; they were meant to provide the broadest protection possible to facilitate global finality for Travelers as a necessary condition for it to make a significant contribution to the Manville estate." (COL ¶ 23; 2004 WL 1876046, at *31.) The gravamen of the Direct Action Suits were acts or omissions by Travelers arising from or relating to the Travelers' insurance coverage of Manville. (COL ¶ 25; 2004 WL 1876046, at *32.)

The Bankruptcy Court also concluded that the Direct Action Suits violated additional provisions in the Confirmation Order, which provided that:

> All Persons and Government Units are hereby stayed, restrained and enjoined from taking one or more of the following actions for the purpose of, *directly or indirectly*, collecting, recovering or receiving payment of, on or with respect to any Claim, Interest or Other Asbestos Obligation[6] [including] . . . [c]ommencing, conducting, or continuing in any manner, *directly or indirectly*, any suit, action or other proceeding (including without limitation any thereof in a judicial, arbitral, administrative or other forum) against or affecting Debtors, any of the Debtors' Subsidiaries, the Canadian Companies or *any of the Settling Insurance Companies* or any property of any of the foregoing or any direct or indirect transferee of any property of, or direct or indirect successor in interest to, any of the foregoing, or any property of any such transferee or successor . . . .

[6] The term "Other Asbestos Obligation" is defined in Exhibit A to the Plan as:

> (a) all debts, obligations or liabilities (under any theory of law, equity or admiralty) . . . for death, personal injuries or personal damages (whether physical, emotional or otherwise) to the extent caused, directly or indirectly, by exposure to asbestos (alone or as contained in asbestos-containing products) and arising or allegedly arising, directly or indirectly, from acts or omissions prior to the Confirmation Date of one or more of the Debtors including, without limitation, all obligations or liabilities

(Confirmation Order at ¶ 29 (emphasis added).) The Direct Action Suits are actions against one of the "Settling Insurance Companies" to receive payment on an "Other Asbestos Obligation," and thus barred by the Confirmation Order as well. The Bankruptcy Court explained that if the Direct Action plaintiffs had been compensated 100% by Manville or the Manville Trust, they would have had no economic basis to bring claims against Travelers for its Manville-related conduct. It was only because those claimants were compensated less than 100% that they sought further compensation from Travelers. But the possibility of seeking additional compensation from Travelers for such claims was foreclosed by the broad injunction entered in the Confirmation Order. (COL ¶¶ 30-32; 2004 WL 1876046, at *33.)

It is reasonable to interpret the 1986 Orders as giving Travelers such broad protection against Direct Action Suits to induce it to contribute funds to the Manville Trust, which was key to the confirmation of the Manville Plan. The Bankruptcy Court "understood that insurers

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for compensatory damages (such as loss of consortium, wrongful death, survivorship, proximate, consequential, general and special damages) and punitive damages and (b) all warranty, guarantee, indemnification or contribution liabilities or obligations, if any, of any of the Debtors to any other Person to the extent that such warranties, guarantees, indemnifications or contribution responsibilities cover claims against such other Person that would, if such claims had been made directly against any of the Debtors, constitute Other Asbestos Obligations under Clause (a) above.

(Docket No. 3415, Ex. H.)

would not contribute funds [to the Manville Trust] without receiving assurances that any liabilities arising from or relating to their insurance relationships with Manville would be fully and finally resolved." (COL ¶ 20; 2004 WL 1876046, at *30.) This conclusion is bolstered by the fact that even in 1986, Travelers was already enmeshed in direct action litigation in Louisiana. (FOF ¶ 55; 2004 WL 1876046, at *14), citing *Wedgeworth v. Fibreboard Corp.*, 706 F.2d 541, 546-48 (5th Cir.1983) (discussing direct action claims by Manville factory workers against Travelers); *see also In re Johns-Manville Corp.*, 33 B.R. 254, 265 (Bankr.S.D.N.Y.1983) ("Direct action suits have been filed, and in Louisiana there are almost two hundred, in which Travelers has been named as a party Defendant.")

Similarly, the contribution and indemnity claims of the Objecting Insurers were barred by the same broad provisions of the 1986 Orders. The 1986 Orders applied to "all Persons," and were not limited to individual plaintiffs with asbestos-related injuries. The Orders also provided protection from other insurance companies who sought to hold Travelers liable indirectly for the damages that it could not be held directly liable to the individual claimants. The other insurance companies were precluded from suing Travelers for claims "based upon, arising out of, or relating to any or all of the [insurance policies]." (Insurance Settlement Order at 165, ¶ 23.1; *see also* COL ¶¶ 34-35; 2004 WL 1876046, at *33-34.)

Therefore, the Bankruptcy Court correctly interpreted its own 1986 Orders as covering the

Direct Action Suits and the related contribution and indemnification claims.

2.

Having determined that the 1986 Orders covered the suits at issue, the next issue is whether the 1986 Orders themselves were proper exercises of jurisdiction over non-debtors. The starting point for the resolution of this issue is *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89 (2d Cir.1988), which the Bankruptcy Court cites as having already considered and rejected a jurisdictional challenge to the 1986 Orders. (COL ¶¶ 8-9; 2004 WL 1876046, at *28.)

In *MacArthur*, the plaintiff alleged it was a coinsured under some of Manville's insurance polices pursuant to "vendor endorsements" contained in the policies. *MacArthur*, 837 F.2d at 90. The plaintiff argued that its "vendor endorsement" claims against the settling Manville insurers were too remote from the Chapter 11 proceedings for the Bankruptcy Court to exercise jurisdiction, and thus the 1986 Orders could not be enforced against it. The plaintiff characterized its interest in the vendor endorsements as contractual claims against the non-debtor insurance companies over which the Bankruptcy Court had no jurisdiction. The Second Circuit Court of Appeal held the plaintiff's claims were essentially derivative claims against the Manville insurance policies, which were property of the estate. *Id.* at 92. The Court of Appeals concluded that the Bankruptcy Court's broad jurisdiction over the property of the estate gave it jurisdic-

tion over the plaintiff's claims. *Id.* at 93; *see also* 28 U.S.C. 1334(e) ("The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction . . . of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.")

The Court of Appeals has since reaffirmed its analysis with regards to the 1986 Orders. *See Kane v. Johns-Manville Corp.*, 843 F.2d 636, 643 n. 4 (2d Cir.1988) ("Kane also challenges the Injunction on the ground that it grants a discharge to non-debtor parties, who are not entitled to the protection of Chapter 11, specifically Manville's insurers and certain Manville subsidiaries. We have recently determined that the insurers may lawfully be protected from asbestos-related claims.") (citing *MacArthur*); *see also In re Joint Eastern and Southern Dist. Asbestos Litig.*, No. 95-5008, 1996 WL 77954, at *2 (2d Cir.1996) (unpublished opinion regarding the same 1986 Orders) ("O'Malley's challenge to the Trial Courts' reaffirmation and continuation of the bankruptcy court's 1986 order enjoining suits against Manville and its insurers is without merit. Such an injunction is essential to the success of the Settlement, and its continuation was well within the discretion of the Trial Courts.") (citing *Kane* and *MacArthur*).

As part of its analysis, the *MacArthur* court compared the plaintiff's claims to "claims by asbestos victims against Manville's insurers in jurisdictions allowing direct actions against the insurers," which could properly be enjoined because judgment against the insurers would

reduce the proceeds recoverable from the insurance policies, thus affecting the debtor's estate. *MacArthur*, 837 F.2d at 92 (citing *GAF Corp. v. Johns-Manville Corp.*, 26 B.R. 405 (Bankr. S.D.N.Y.1983), *aff'd*, 40 B.R. 219 (S.D.N.Y.1984)). The Court of Appeals also adopted the reasoning of *In re Davis*, 730 F.2d 176, 183-84 (5th Cir.1984) (per curiam) (rejecting claim that direct actions against insurers have no reasonable nexus with bankruptcy proceedings).

In *Davis*, the Fifth Circuit Court of Appeals found that insurance policies fell within the definition of "property of the estate" in 11 U.S.C. § 541(a)(1), thus establishing jurisdiction over "direct action" claims that would diminish those policies. *Id.* at 184. The Court of Appeals refused to lift a stay of direct actions against Manville insurers because the "bankruptcy court . . . has authority to issue a stay order intended to shield the insurers of Johns-Manville and its executives if the insurance policies constitute 'property of the estate.'" *Id.* Other courts have also adopted *Davis*' analysis. *See, e.g., In re Forty-Eight Insulations, Inc.*, 54 B.R. 905, 908-09 (Bankr.Ill.1985) (citing *Davis* and finding that direct actions suits under Illinois Insurance Code § 378 against insurers of a debtor asbestos product manufacturer violated the automatic stay because insurance policies are property of the debtor's estate).

It is clear from *MacArthur* and *Davis* that the Bankruptcy Court had jurisdiction over Travelers' insurance policies, and could act to protect them from dissipation by direct action claims by enjoining those claims and channeling them into the Manville Trust, into which the proceeds of

the insurance settlement were also channeled. Suits that seek direct recovery authorized by state statutes from Travelers' insurance policies would reduce the estate's recovery from those policies, thus affecting the "property of the estate." Moreover, direct action claims that are derivative of the right to recover under these policies—such as claims for negligent undertaking or failure to settle—can similarly be enjoined to protect the property of the estate. *Cf. MacArthur,* 837 F.2d at 92 (approving the injunction against MacArthur's vendor endorsement claims because they were derivative of Manville's rights as the primary insured: "Such derivative rights are no different in this respect from those of the asbestos victims who have already been barred from asserting direct actions against the insurers.") Thus, the 1986 Orders had subject matter jurisdiction to enjoin these types of direct action claims.

This conclusion is also supported by legislation enacted by Congress that explicitly authorized bankruptcy court injunctions barring derivative claims against third party insurers. The Bankruptcy Reform Act of 1994 added to the Bankruptcy Code a new section 524(g), which was modeled on the Manville injunction.[7] Section 524(g)(4)(A)(ii) provides:

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[7] The legislative history indicates that Congress modeled § 524(g) on the channeling injunction in the Johns-Manville case, and sought to strengthen the Manville injunction mechanisms through this codification without having to reopen its case. *See* H.R. Rep. 103-835, at 41 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3340, 3349.

> [A]n injunction may bar any action directed against a third party who is identifiable from the terms of such injunction (by name or as part of an identifiable group) and is alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor to the extent such alleged liability of such third party arises by reason of . . . the third party's provision of insurance to the debtor or a related party . . . .

11 U.S.C. § 524(g)(4)(A)(ii). Congress thus explicitly indicated that the Bankruptcy Court's subject matter jurisdiction extended to claims against third party insurers arising from their insurance relationship with the debtor tortfeasor. Therefore, the Bankruptcy Court has jurisdiction over any claim arising from Travelers' insurance relationship with Manville by plaintiffs injured by Manville asbestos.

The appellants argue that the Direct Action Suits at issue here—unlike the direct actions pending at the time of the 1986 Orders—do not seek the proceeds of the insurance policies nor involve injuries from Manville products, but rather allege that Travelers breached its statutory duties or engaged in independent tortious conduct in defending insureds other than Manville.[8] While they attempt to characterize the Direct Action Suits as being unrelated to Manville, the Bankruptcy Court found as a fact that the gravamen of these suits is that Travel-

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[8] The plaintiffs have candidly admitted that many of these theories of liability have never been accepted by any court. (FOF ¶ 81; 2004 WL 1876046, at *19.)

ers learned of asbestos risks from its defense of Manville in asbestos-related claims, and failed to disclose or otherwise had suppressed this knowledge. (FOF at ¶¶ 73-88; 2004 WL 1876046, at *18-20.) Moreover, while appellants characterize the Direct Action Suits as not stemming from injuries by Manville products, the Bankruptcy Court concluded "as a factual matter, that essentially all potential asbestos claimants—including all plaintiffs with Direct Action Claims—have been exposed to Manville asbestos through Manville's pervasive asbestos mining, processing and manufacturing activities." (*Id.* at ¶ 11; 2004 WL 1876046, at *5.) The Bankruptcy Court then rejected the notion that plaintiffs could remove the connection to Manville by artful pleading:

> After the Court preliminarily enjoined prosecution of Direct Action Claims against Travelers pending final ruling on the merits, certain plaintiffs' lawyers violated the letter and the spirit of this Court's rulings by simply deleting the term "Manville" from their complaints—but leaving the substance unchanged.

(*Id.* at ¶ 89; 2004 WL 1876046, at *21.)

The Bankruptcy Court considered the appellants' reference to Travelers' conduct regarding other policyholders, but "other than the acknowledgement of the undisputed fact that there were other such insureds, the Court was not presented with a scintilla of evidence regarding the scope, duration or intensity of any such relationship." (*Id.* at ¶ 49; 2004 WL 1876046, at *13.) The Bankruptcy Court factually concluded that

"Travelers learned virtually everything it knew about asbestos from its relationship with Manville," and accepted the "unrebutted" expert testimony of Professor George Priest, "a recognized expert in insurance litigation," that "the Direct Action Claims against Travelers 'inescapabl[y]' relate to its insurance relationship with Manville." (*Id.* at ¶¶ 49-50; 2004 WL 1876046, at *13.) The Bankruptcy Court also factually concluded that Travelers' conduct in defending against Manville asbestos claims was directly related to the insurance policies:

> Every dollar paid by Travelers on account of Manville—whether to Manville itself, to outside defense counsel hired to defend Manville, to Travelers employees inspecting or investigating Manville facilities or claims, or to asbestos claimants in satisfaction of judgments against or settlements with Manville—correlated to a specific provision in the policies that Travelers issued to Manville.

(*Id.* at ¶ 48; 2004 WL 1876046, at *13.) Because Travelers' knowledge of asbestos and conduct in defending Manville arises from the Manville insurance policies, and because the Direct Action claimants were attempting to recover additional funds for asbestos claims that they were unable to collect from the Manville Trust, the Bankruptcy Court concluded that the Direct Action Suits were, in fact, creatively pleaded attempts to collect indirectly against the Manville insurance policies, and that barring

these claims was a proper exercise of jurisdiction. (COL ¶¶ 25-32; 2004 WL 1876046, at *32-33.)

This analysis is persuasive and unrebutted by the appellants.[9] Thus, the Court affirms the Bankruptcy Court's conclusion that it had jurisdiction in 1986 to enjoin the Direct Action Suits.[10] The Court also notes that Judge Lynch appeared to conclude similarly when rejecting a jurisdictional challenge to the June 24, 2003 preliminary injunction issued by the Bankruptcy Court temporarily enjoining the same Direct Action Suits at issue here. *See Carter v. Travelers Indemnity Co. (In re Johns-Manville Corp.)*, No. 03 Civ. 7173, 2004 WL 385118, *2 (S.D.N.Y. March 2, 2004) (plaintiff's "challenge to the bankruptcy court's jurisdiction is completely without merit").

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[9] Continental challenges the factual finding that Travelers learned "virtually everything" about asbestos from Manville, citing a single complaint that alleges that Travelers learned of the hazards of asbestos from other sources. (*See* Complaint in *Wise v. Travelers Indemnity Co.*, No. 01-C-599 (W.Va.Cir.Ct.) ¶¶ 79-110.) However, unproven allegations in a complaint fail to meet the heavy burden of showing "clear error" in the Bankruptcy Court's factual findings.

[10] It also follows that because the Bankruptcy Court had jurisdiction to enjoin the Direct Action Suits, it had jurisdiction to enjoin the claims by other insurers against Travelers for contribution or indemnity. Those claims are indirect efforts to hold Travelers liable for the same claims which the Bankruptcy Court had the power to enjoin.

3.

A final step remains, however, in determining whether the Bankruptcy Court's subject matter jurisdiction permitted other disputed provisions of the Clarifying Order, particularly the approval of the settlement of the Direct Action Suits and the "gate-keeping" provision. The appellants also raise the possibility that the Clarifying Order impermissibly bars suits involving Travelers' conduct with respect to insureds other than Manville and asbestos injury completely unrelated to Manville. In light of the Bankruptcy Court's extensive factual findings regarding the breadth of Traveler's conduct on behalf of Manville and the pervasiveness of Manville's asbestos, the Court finds that such a possibility is unlikely.

Nonetheless, the jurisdictional analysis above makes clear that the Bankruptcy Court has no jurisdiction to bar a suit alleging tortious conduct by Travelers on behalf of a non-Manville insured, conduct that is unrelated to Manville and not based on any knowledge of asbestos hazard gained from Manville, and that did not involve Manville asbestos or asbestos products. Indeed, the Bankruptcy Court itself recognized the limits of its jurisdiction in the Clarifying Order by providing that:

> [N]othing in this Order shall enjoin . . . claims arising from contractual obligations by Travelers to policyholders other than Manville, as long as Travelers [sic] alleged liability or the proof required to establish Travelers [sic] alleged liability is unrelated

> to any knowledge Travelers gained from its insurance relationship with Manville or acts, errors, omissions or evidence related to Travelers [sic] insurance relationship with Manville . . . .

(Clarifying Order ¶ 9(b).) The Clarifying Order also made clear that it was not enjoining "claims against Travelers by policyholders other than Manville . . . for insurance proceeds or other obligations arising under any policy of insurance provided by Travelers to a policyholder other than Manville." (*Id.* at ¶ 9(a).)[11]

The Bankruptcy Court also included a "gate-keeping" provision to screen out suits that did not fall within its subject matter jurisdiction. (*Id.* at ¶ 9(c).) The Objecting Claimants challenge the jurisdictional basis for this gate-keeping provision, which requires future asbestos-related direct action claimants against Travelers to establish first before the Bankruptcy Court that their actions are not based on any relationship that Travelers had with Manville and do not vio-

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[11] Continental also argues that the Clarifying Order's definition of "Travelers" exceeded the scope of the Order's jurisdiction by including Travelers Casualty (formerly Aetna Casualty) and former Travelers affiliate Citigroup in addition to Travelers Indemnity. However, Aetna Casualty was explicitly similarly covered by the Insurance Settlement Order. The Clarifying Order properly barred suits against Citigroup as a Travelers affiliate that arise out of Travelers' insurance relationship with Manville; claims against Citigroup unrelated to Manville would not be covered. (Clarifying Order ¶¶ 9(a) and (b).)

late the Bankruptcy Court's bar orders.[12] The Objecting Claimants argue that this exceeds the Bankruptcy Court's jurisdiction by requiring third parties with claims against Travelers unrelated to Mansville to make an application before the Bankruptcy Court before proceeding with their actions in state or federal court.

In response to such arguments, the Bankruptcy Court concluded that its bar orders have been "repeatedly violated by creative plaintiffs," and that its broad discretionary powers in enforcing its orders allowed it to make the initial determination of whether an asbestos suit against Travelers would violate its orders. (COL ¶¶ 39-42,

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[12] The "gate-keeping" provision, found in Paragraph 9 of the Clarifying Order, provides:

> [N]othing in this Order shall enjoin:
>
> (c) the commencement of asbestos-related direct actions against Travelers arising out of any policy of insurance provided by Travelers to a policyholder other than Manville or involving acts or omissions in connection with such policies, provided that, prior to commencing any such action, the plaintiff shall, upon notice to Travelers, (i) make an application to this Court seeking leave to bring such action, upon representations that no allegations will be made nor evidence will be introduced relating to exposure to Manville asbestos, Travelers [sic] defense of Manville or Travelers [sic] knowledge or alleged knowledge concerning the hazards of asbestos directly or indirectly arising out of its insurance relationship with Manville, and (ii) obtain an order from this Court that the proposed direct action is not covered by the Confirmation Order, including the Insurance Settlement Order, the Channeling Injunction and this Order.

2004 WL 1876046, at *35-36.) The Bankruptcy Court relied on cases where parties before a court had previously violated that court's orders, *see Berger v. Heckler*, 771 F.2d 1556 (2d Cir.1985), and cases relating to the scope of equitable relief to remedy a party's unlawful conduct. *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971). At the July 6, 2004 hearing, the Bankruptcy Court also cited the automatic stay provision in 11 U.S.C. § 362 as the "ultimate gate-keeping statute" as support for the provision requiring a potential plaintiff to seek permission of the bankruptcy court before bringing a suit against Travelers. (July 6, 2004 Hearing Tr., at 179.) None of these arguments establish jurisdiction to act as a gatekeeper of claims against a *non-debtor*—as opposed to a debtor subject to the automatic stay.

While the Bankruptcy Court is authorized under 11 U.S.C. § 105(a) to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title," this broad statutory authority does not, in itself, provide jurisdiction. *Combustion Engineering*, 391 F.3d at 225. If "creative plaintiffs" violate the Bankruptcy Court's orders in their attempts to plead around the injunction, the Bankruptcy Court has jurisdiction to find them in contempt. But the Bankruptcy Court has no jurisdiction to screen, in the first instance, suits against a non-debtor that purport to assert claims unrelated to the debtor or the estate. Moreover, the equitable powers of a court to enforce its orders against a recalcitrant party provide no basis for the Bankruptcy Court to require unspecified persons

who may not be parties before the that Court to seek its approval before bringing lawsuits that may have no relationship to the Bankruptcy Court's prior orders. Thus, the gate-keeping provision in Paragraph 9(c) must be vacated.

Finally, the appellants challenge the independent jurisdictional basis for the Bankruptcy Court's approval of the settlements of the Direct Action Suits. The parties characterize the settlements as analytically distinct from the Bankruptcy Court's interpretation of the 1986 Orders. Nonetheless, as the Bankruptcy Court found, the Direct Action Suits are violations of the 1986 Orders. The motion by Travelers to enjoin the Direct Action Suits—as well as the possibility of contempt for disregarding the 1986 Orders—created a dispute properly before the Bankruptcy Court, which then referred this dispute to mediation. The settlements are a product of the mediation and represent a resolution of a dispute within the Bankruptcy Court's jurisdiction.

Continental and Chubb argue that, having found that the Direct Action Suits violated the 1986 Orders, the Bankruptcy Court could not thereafter approve the settlement of those actions. They argue that jurisdiction was limited to finding the plaintiffs in those suits in violation of the outstanding orders. However, there was plainly a dispute over the scope of the Bankruptcy Court's 1986 Orders and the resolution of that dispute was within the Bankruptcy Court's jurisdiction. The settlement was only reached after considerable time and effort by a sophisticated mediator. It provided a level of

additional certainty and repose for which Travelers was prepared to pay. The fact that other insurance companies question that choice did not deprive the Bankruptcy Court of jurisdiction. Thus, approving the settlements was a proper exercise of the Bankruptcy Court's jurisdiction.

In conclusion, the Bankruptcy Court has subject matter jurisdiction to enjoin the Direct Action Suits pursuant to the 1986 Orders and the Clarifying Order, but does not have jurisdiction to act as a "gate-keeper" and to review suits that purport not to relate to Travelers' relationship with Manville.

B.

Continental and Chubb argue that even if the Bankruptcy Court had subject matter jurisdiction over the Direct Action Suits, the Clarifying Order still exceeded the Bankruptcy Court's statutory authority under 11 U.S.C. §§ 105(a) and 524(g).

Continental argues that extending the injunction barring suits against Travelers to include claims unrelated to Manville could not be essential to Manville's reorganization, and thus is beyond the statutory authority conferred by § 105(a). This argument ignores the Bankruptcy Court's factual findings detailed above—which are not clearly erroneous—that the Direct Action Suits against Travelers were, in fact, indirect attempts to collect on the insurance policies, and that essentially all the plaintiffs in those suits were exposed to Manville asbestos. Moreover, the Second Circuit Court of Appeals, in upholding the same injunction, noted it was necessary for

the Manville reorganization. *MacArthur*, 837 F.2d at 93 (citing § 105(a) as authority for the injunction, and also noting that § 105 "has been construed liberally to enjoin suits that might impede the reorganization process"); *see also Kane*, 843 F.2d at 643 n. 4.

Chubb argues that the Bankruptcy Court could not expand the original 1986 Orders except by an injunction that satisfied the requirements of 11 U.S.C. § 524(g), and that the Clarifying Order did not comply with § 524(g) because the new settlement funds were not placed in the Manville Trust, which Chubb contends is required by 11 U.S.C. § 524(g)(4)(B)(ii). This argument also fails, because the injunctions in the 1986 Orders predated the enactment of § 524(g) in the Bankruptcy Reform Act of 1994, and thus falls within the "grandfather" provision under 11 U.S.C. § 524(h). Section 524(h) provides that "[f]or purposes of subsection (g) . . . if an injunction of the kind described in [§ 524(g)] was issued before the date of the enactment of this Act, as part of a plan of reorganization confirmed by an order entered before such date, then the injunction shall be considered to meet the requirements of [§ 524(g)]" if it meets certain requirements, all of which are applicable here. Thus, the injunctions in the 1986 Orders are within the Bankruptcy Court's statutory authority, and it is *those* Orders which were sufficient to bar the Direct Actions.

C.

Chubb separately argues that even if the 1986 Orders were proper, Chubb is not bound by them. Chubb argues that it did not have proper notice of the 1986 Orders because—despite being a sophisticated insurer—it could not have thought that it would be affected by the Orders at the time because it was not a Manville insurer. Chubb further argues that because it was not adequately represented as a future claimant at the proceedings regarding the 1986 Orders, Chubb is not bound by those Orders and the subsequent Clarifying Order in light of the due process concerns identified in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999). *See also Wolfert v. Transamerica Home First, Inc.*, 439 F.3d 165 (2d Cir.2006); *Stephenson v. Dow Chem. Co.*, 273 F.3d 249 (2d Cir.2001), *aff'd by an equally divided Court in pertinent part, vacated in part on other grounds*, 539 U.S. 111, 123 S.Ct. 2161, 156 L.Ed.2d 106 (2003).

Chubb's argument fails for several reasons. The broad language regarding the proposed Insurance Settlement Order in the nationwide August 2, 1984 Notice of Hearing to Consider Approval of Compromise and Settlement of Insurance Litigation should have put Chubb—a sophisticated insurer with asbestos-related insurance policies—on notice with regards to whatever asbestos-related claims it may have

against Travelers and the other settling insurers.[13] Indeed, the Court of Appeals rejected a similar argument in *MacArthur:* ". . . MacArthur and all other interested parties were provided with notice and a hearing before the settlements were approved by the Bankruptcy Court. The notice of proposed settlements issued by the Bankruptcy Court met the requirements of due process." *MacArthur,* 837 F.2d at 94.

Moreover, the Supreme Court recognized that there is an exception to the due process concerns raised by Chubb "where a special remedial scheme exists expressly foreclosing successive litigation by nonlitigants, as for example in bankruptcy or probate." *Ortiz,* 527 U.S. at 846, 119 S.Ct. 2295 (internal quotation omitted). Unlike the class action settlements in *Amchem* and *Ortiz,* the injunction here is based on the Bankruptcy Court's *in rem* power over the Manville estate, including the insurance policies. "A bankruptcy court's *in rem* jurisdiction permits it to 'determin[e] all claims that anyone, whether

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[13] The August 2, 1984 Notice provided:

> An order of the Bankruptcy Court shall be obtained providing that all persons shall be restrained and enjoined from commencing and/or continuing any suit, arbitration or other proceeding of any type or nature for any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be asserted by any person against any and all the Settling Carriers based upon, arising out of or relating to any or all of the insurance policies . . . .

(Docket No. 3684, Ex. G at 5.)

named in the action or not, has to the property or thing in question. The proceeding is "one against the world." ' " *Tennessee Student Assistance Corp. v. Hood,* 541 U.S. 440, 448, 124 S.Ct. 1905, 158 L.Ed.2d 764 (2004) (quoting 16 J. Moore, et al., *Moore's Federal Practice* § 108.70[1], p. 108-106 (3d ed.2004)). Thus, the Bankruptcy Court's power over the estate allows it to bar Chubb's indirect claims against the estate.

D.

OneBeacon—and to some extent also Continental—argue that if the Clarifying Order purports to clarify the 1986 Orders as applying to Travelers, then the Clarifying Order should also apply to them as Manville insurers who settled in 1986 pursuant to the same 1986 Orders. The Clarifying Order itself specifies that it applies only to Travelers. Both OneBeacon and Continental filed their own separate motions before the Bankruptcy Court seeking to enjoin the Direct Action Suits filed against them as barred by the 1986 Orders. Those motions remain pending.

The Bankruptcy Court addressed these pending motions during the July 6, 2004 hearing on Travelers' motion, and found it premature to consider them:

> There are separate motions pending before me for the other carriers to be included, and if and when those motions are actually coming before me without the benefit of having

> been resolved . . . then it is germane at that particular time.

(July 6, 2004 Hearing Tr., at 117.) OneBeacon argues that despite the fact that the Bankruptcy Court has yet to rule on its motion, this issue is ripe for this Court to consider because the Bankruptcy Court's failure to include OneBeacon in the Clarifying Order already affected OneBeacon's contribution and indemnification rights against Travelers. However, there is no Bankruptcy Court ruling for this Court to consider on appeal as to whether the 1986 Orders similarly cover OneBeacon or Continental and thus similarly bar claims against those insurers as well. This issue is not ripe for review until OneBeacon and Continental have a ruling on their separate motions before the Bankruptcy Court.

E.

The Objecting Claimants argue that the Bankruptcy Court made various procedural errors in approving the settlement. In reviewing the Bankruptcy Court's decision to approve a settlement, this Court's review "is restricted to determining whether there was a clear abuse of discretion." *Nellis v. Shugrue,* 165 B.R. 115, 123 (S.D.N.Y.1994). The Bankruptcy Court "must make an independent determination when approving a settlement," but "should not conduct a 'mini-trial' on the merits." *Id.* at 122.

1.

The Objecting Claimants argue that the Bankruptcy Court failed to conduct a thorough analysis of the reasonableness of the settlement with the Common Law Plaintiffs. In particular, the Objecting Claimants allege that the Bankruptcy Court failed to consider the probability of success in litigation, the interest of the common law plaintiffs as creditors to the estate, and the breadth of the release. The sole evidence provided by the Objecting Claimants of such allegations is the Bankruptcy Court's limitation of questioning and proof in connection with the cross-examination of a single witness. (*See* July 6, 2004 Hearing Tr., at 166.) However, a bankruptcy judge "is not required to assess the minutia of each and every claim," but instead "need only canvass the settlement to determine whether it is within the acceptable range of reasonableness." *Nellis,* 165 B.R. at 123 (citing *In re W.T. Grant Co.,* 699 F.2d 599, 608 (2d Cir.1983)).

The Objecting Claimants have failed to show a clear abuse of discretion. In light of the fact that the "experience and knowledge of the bankruptcy court judge is of significance in assessing the propriety of the settlement," *Nellis,* 165 B.R. at 123, the Bankruptcy Court's over twenty years experience with the Manville reorganization supports the conclusion that the settlement was fair and equitable. The Bankruptcy Court specifically considered the balance between the likelihood of success compared to the present and future benefits of the settlement, the prospect of complex and protracted litigation if the settlements were not

approved, the competency and experience of counsel, the relative benefits to the settling parties, the nature and extent of the releases, and the extent to which the settlement was the product of arm's length bargaining. The Bankruptcy Court specifically noted that the settlements provided Manville Claimants with a significant new source of asbestos compensation. (COL ¶¶ 52-54; 2004 WL 1876046, at *36-37.) The Bankruptcy Court considered extensive submissions and heard arguments at the July 6, 2004 evidentiary hearing. The Bankruptcy Court properly found that the settlement was fair and equitable.

2.

The Objecting Claimants next challenge as improper the Bankruptcy Court's decision to use the bifurcated approach described in *In re "Agent Orange" Product Liability Litig.*, 818 F.2d 145 (2d Cir.1987), in approving the settlement with the Common Law Plaintiffs prior to approving the still-to-be-determined fund distribution procedures. The Objecting Claimants argue that the fairness of a settlement cannot be properly evaluated until the fund distribution procedures are already known. This argument has no merit and is contradicted by considerable precedent. *See Agent Orange,* 818 F.2d at 170 ("To impose an absolute requirement that a hearing on the fairness of a settlement follow adoption of a distribution plan would immensely complicate settlement negotiations and might so overburden the parties and the district court as to prevent either task from being accomplished."); *Nellis,*

165 B.R. at 126 ("Approval of a settlement can predate the determination of individual awards under the distribution plan."); *see also Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1153 (8th Cir.1999); *In re Holocaust Victim Assets Litig.*, 105 F.Supp.2d 139, 149-51 (E.D.N.Y.2000); *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 480 (S.D.N.Y.1998); *In re Drexel Burnham Lambert Group, Inc.*, 130 B.R. 910, 922 (S.D.N.Y.1991).

3.

The Objecting Claimants argue that they received only eighteen days notice of the proposed settlement, rather than the twenty day notice required by Fed. R. Bankr.P. 2002(a)(3) for a "hearing on approval of a compromise or settlement of a controversy . . . ." By the Objecting Claimants' calculations, because the notice of the hearing on the motion to approve the settlement was mailed on June 7, 2004, and the deadline for objections to be filed was June 28, 2004, only eighteen days notice for objections was given, when factoring in the presumed three days mailing time provided for in Fed. R. Bankr.P. 9006(f).

This objection is specious. Rule 2002(a)(3) requires a twenty day notice for a hearing, not for the deadline for filing objections. Here, more than twenty days notice was given for the hearing, which was on July 6, 2004. Moreover, because the Objecting Claimants did, in fact, receive notice of the hearing, timely filed objections, and participated in the hearing, there was no prejudice demonstrated.

4.

Certain of the Objecting Claimants (specifically, the "Asbestos Personal Injury Plaintiffs") also argue that the Bankruptcy Court failed to conduct the appropriate analysis regarding the reasonableness of the $20 million attorneys' fees awarded to counsel for the Common Law Plaintiffs. (Objecting Claimants Brief at 39-40.) They argue that the Bankruptcy Court did not examine the factors for approving applications for attorneys' fees identified in *Chatelain v. Prudential-Bache Securities, Inc.*, 805 F.Supp. 209, 216 (S.D.N.Y.1992) ("In approving applications for attorneys' fees, courts in this circuit examine the following factors: (1) time and labor expended by counsel; (2) magnitude and complexity of the litigation; (3) risk of the litigation; (4) quality of representation; (5) requested fee in relation to the settlement; and (6) public policy considerations.")

Courts in this circuit also calculate attorneys' fees as a percentage of the recovery, and have granted awards of 15% to 50% of the settlement. *Id.* at 215. In this case, Travelers paid the $20 million attorneys' fee in addition to the $70 million settlement with the Common Law Plaintiffs, meaning that the attorneys' fees were approximately 22% of the total $90 million recovery, in line with other acceptable percentages identified in *Chatelain*. *Id.* at 215-16 (noting that courts have approved attorneys' fees amounting to 25%, 27%, and 28% of recovery).

Moreover, the Clarifying Order specifically found that the attorneys fees of the Common Law

Plaintiffs' counsel were "fair, equitable and reasonable in light of the complexity of the litigations and the size of the recoveries for the . . . Common Law Direct Action Plaintiffs . . . ." (Clarifying Order at 4.) Given the Bankruptcy Court's familiarity with the claims in the case and their history and complexity, as well as the significant benefits obtained by the counsel for the Common Law Plaintiffs, there was ample basis for approving the fee. There is no showing that there was a clear abuse of discretion in approving the $20 million attorneys' fee.

5.

The Objecting Claimants conclude with a perfunctory argument that the Bankruptcy Court erred in denying their motion to amend findings or for a new trial pursuant to Fed.R.Civ.P. 59. Because, as explained above, the Objecting Claimants have failed to demonstrate that the Bankruptcy Court made a manifest error or caused a manifest injustice, the Bankruptcy Court correctly denied the motion.

F.

Finally, the Court considers the merits of the appellants' objections to the judgment reduction provision discussed above with respect to the motion to dismiss.

The Objecting Insurers argue that the judgment reduction provision is unenforceable because the Bankruptcy Court lacked jurisdiction to enter the Clarifying Order. For the reasons

discussed above, the Bankruptcy Court had such jurisdiction.

The Objecting Insurers also argue that the judgment reduction provision is unfair to them for various reasons. The Objecting Insurers argue that at least three states in which Direct Action Suits are pending (West Virginia, Ohio, and Massachusetts) permit only *pro tanto* judgment reduction (i.e., the amount plaintiffs recovered from the settlement fund), meaning that Objecting Insurers could potentially receive zero judgment reduction in some cases if the settlement funds were exhausted. The Objecting Insurers further argue that future claimants could challenge the enforceability of the judgment reduction provision on due process grounds. The Objecting Insurers also protest that they would be burdened by being forced to seek enforcement of the judgment reduction provision in the Bankruptcy Court. OneBeacon additionally argues that the bar order prevents it from taking discovery from Travelers to defend itself in Direct Actions Suits and to enforce the judgment reduction provision. However, OneBeacon and the other Objecting Insurers would be able to seek discovery from Travelers as a third party by normal third party discovery rules.

The Bankruptcy Court's determination that the judgment reduction provision adequately protected the non-settling insurance companies cannot be said to be a clear abuse of discretion, especially where the Bankruptcy Court found that the 1986 Orders already barred contribution and indemnification claims even before the settlement. (COL ¶ 35; 2004 WL 1876046, at *34.)

The bar order in the Confirmation Order has been upheld as valid. *MacArthur*, 837 F.2d at 93; *Kane*, 843 F.2d at 643 n. 4. Moreover, other courts have upheld settlements that seek to ameliorate the harm from bar orders by imposing similar judgment reduction provisions. *See Gerber*, 329 F.3d at 302-06; *Eichenholtz*, 52 F.3d at 487; *In re WorldCom, Inc. Securities Litig.*, No. 02 Civ. 3288, 2005 WL 591189, at *8-9 (S.D.N.Y. March 14, 2005); *WorldCom*, 339 F.Supp.2d at 568.

Finally, with respect to the argument that future claimants would be able to assert due process challenge claims against the enforcement of the judgment reduction provision, the Second Circuit Court of Appeals has already rejected such a challenge. In an unpublished opinion, the Court of Appeals reviewed the record of the Manville bankruptcy and noted that future claimants were adequately represented with regards to the confirmation of the Manville Plan:

> We reject O'Malley's challenge to the performance of the Legal Representative of future claimants substantially for the reason stated by the Trial Courts in their Amended Memorandum, Orders and Final Judgment dated January 19, 1995, reported at 878 F.Supp. 473. *See, e.g., id.* at 565 (Legal Representative "took an active and aggressive role in protecting future claimants" in this litigation).

Joint Eastern and Southern Dist. Asbestos Litig., 1996 WL 77954, at *1.

The appellants have failed to show that the Bankruptcy Court abused its discretion in determining that the settlement, including the judgment reduction provision, was fair and reasonable.

CONCLUSION

The Court has considered all of the arguments. To the extent not specifically addressed herein, the arguments are either moot or without merit. The motions to dismiss are denied. With respect to the merits of the various appeals, the Bankruptcy Court's Findings and Clarifying Order are affirmed, except for the portions relating to the "gate-keeping" provision. Thus, paragraph 9(c) of the Clarifying Order is vacated.

SO ORDERED.

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

In proceedings for a Reorganization
Under Chapter 11.
Case Nos. 82 B 11656, 82 B 11657,
82 B 11660, 82 B 11661, 82 B 11665
through 82 B 11673 inclusive,
82 B 11675, 82 B 11676 (BRL)

In re
JOHNS-MANVILLE CORPORATION, MANVILLE CORPORATION, MANVILLE INTERNATIONAL CORPORATION, MANVILLE EXPORT CORPORATION, JOHNS-MANVILLE INTERNATIONAL CORPORATION, MANVILLE SALES CORPORATION, f/k/a JOHNS-MANVILLE SALES CORPORATION, successor by merger to MANVILLE BUILDINGS MATERIALS CORPORATION, MANVILLE PRODUCTS CORPORATION and MANVILLE SERVICE CORPORATION, MANVILLE INTERNATIONAL CANADA, INC., MANVILLE CANADA, INC., MANVILLE INVESTMENT CORPORATION, MANVILLE PROPERTIES CORPORATION, ALLAN-DEANE CORPORATION, KEN-CARYL RANCH CORPORATION, JOHNS-MANVILLE IDAHO, INC., MANVILLE CANADA SERVICE INC., SUNBELT CONTRACTORS, INC.,

Debtors.

ORDER APPROVING SETTLEMENT OF THE STATUTORY, HAWAII AND COMMON LAW DIRECT ACTIONS AND CLARIFYING CONFIRMATION ORDER, INCLUDING INSURANCE SETTLEMENT ORDER AND CHANNELING INJUNCTION

WHEREAS, on June 19, 2002 The Travelers Indemnity Company, Travelers Casualty and Surety Company (formerly The Aetna Casualty and Surety Company) and certain affiliates (collectively, "Travelers" as defined below), brought a motion for an Order To Show Cause enjoining plaintiffs from prosecuting certain lawsuits as against Travelers on the grounds that those lawsuits are barred by this Court's prior orders entered in connection with confirmation of the Second Amended and Restated Plan of Reorganization ("Plan") of Johns-Manville Corporation and its affiliates ("Manville");

WHEREAS, Travelers is defined as follows: The Travelers Indemnity Company, Travelers Casualty and Surety Company, Travelers Property Casualty Corp., Citigroup Inc., The Travelers Insurance Company, Travelers Life and Annuity Company, and each of their respective direct or indirect parents, subsidiaries and sister companies (i.e., entities that are directly or indirectly owned or controlled by a common parent or holding company), as well as each of their respective predecessors, successors, assigns, officers and directors. (All of the foregoing collectively referred to as "Travelers Entities"). Travelers shall also include future parents, subsidiaries and sister companies of the Travelers Entities (or succes-

sors of any of the foregoing), provided, however, that nothing in this definition shall be construed to include The St. Paul Companies or any other company first acquiring, acquired by or merging with any of the Travelers Entities on or after November 19, 2003 for liability for such Entity's own conduct and not for conduct relating to or arising from acts, omissions, conduct or issuance of insurance by any of the Travelers Entities. Travelers shall also include past parents, subsidiaries or sister companies of any of the Travelers Entities (or successors of any of the foregoing), provided however that nothing in this definition shall be construed to include any such past parent, subsidiary or sister company that no longer is a parent, subsidiary or sister company of any of the Travelers Entities as of November 19, 2003 for its own conduct after its ownership of or by or affiliation with any of the Travelers Entities ended and not relating to or arising from acts, omissions, conduct or issuance of insurance by any of the Travelers Entities. By way of example, Travelers shall not include Aetna Inc., or any of its predecessors in interest, for their own conduct post-dating April 1996 relating to or arising from acts, omissions, conduct or issuance of insurance and not relating to or arising from acts, omissions, conduct or issuance of insurance by any of the Travelers Entities.

WHEREAS, on December 22, 1986 the Court entered the Confirmation Order, which became final on October 28, 1988 ("Confirmation Order");

WHEREAS, the Confirmation Order contained within it the Insurance Settlement Order previ-

ously entered by this Court and the Channeling Injunction;

WHEREAS, the Confirmation Order found that the Insurance Settlement Order and Channeling Injunctions were essential components of the confirmation of the Manville Plan;

WHEREAS, as stated in the Manville Personal Injury Settlement Trust Agreement (the "Manville Trust"), a vital purpose of the Manville Trust was "to deliver fair, adequate and equitable compensation to bona fide Beneficiaries, whether presently known or unknown . . . with settlement to be preferred over arbitration . . . and over . . . resort to the tort system.";

WHEREAS, another vital, related purpose of the Manville Trust was to enhance and preserve the Manville Trust estate;

WHEREAS, the Confirmation Order adopted these purposes, in part by enjoining the bringing of claims against insurers that arise out of, are based upon or related to settled policies and thereby providing finality to insurers;

WHEREAS, this Court is hereby interpreting and enforcing the Confirmation Order, and the Insurance Settlement Order and Channeling Injunction contained therein, and this Court has jurisdiction to enter this Order under 28 U.S.C. Sections 1334(b), 157(b)(2)(L); 11 U.S.C. Sections 105(a), 1141(a), 1142(b); and *In re Petrie Retail, Inc.*, 304 F.3d 223 (2d Cir. 2002) ("A bankruptcy court retains post-confirmation jurisdiction to interpret and enforce its own orders."); *In re U.S. Brass Corp.*, 301 F.3d 296, 308 (5th Cir. 2002); *In*

re Texaco, Inc., 182 B.R. 937, 944 (S.D.N.Y. 1995); *In re Johns-Manville Corp.*, 97 B.R. 174, 179-80 (Bankr. S.D.N.Y. 1989);

WHEREAS the Statutory Direct Action Settlement Counsel and counsel for Travelers have reached an agreement concerning a settlement of the present motions before the Court filed by Travelers concerning the Statutory Direct Actions;

WHEREAS after giving notice to holders of Statutory Direct Action Claims in a form and manner as approved by this Court and an opportunity to be heard regarding the settlement of the Statutory Direct Actions and the terms of this Order, this Court held a hearing and heard evidence on the fairness of that settlement taking into account all of the factors mandated therefor by the Second Circuit Court of Appeals;

WHEREAS the Hawaii Direct Action Settlement Counsel and counsel for Travelers have reached an agreement concerning a settlement of the present motions before the Court filed by Travelers concerning the Hawaii Direct Action Claims;

WHEREAS after giving notice to holders of Hawaii Direct Action Claims in a form and manner as approved by this Court and an opportunity to be heard regarding the settlement of the Hawaii Direct Actions and the terms of this Order, this Court held a hearing and heard evidence on the fairness of that settlement taking into account all of the factors mandated therefor by the Second Circuit Court of Appeals;

WHEREAS the Common Law Direct Action Settlement Counsel and counsel for Travelers have reached an agreement concerning a settlement of the present motions before the Court filed by Travelers concerning the Common Law Direct Actions;

WHEREAS after giving notice to holders of Common Law Direct Action Claims in a form and manner as approved by this Court and an opportunity to be heard regarding the settlement of the Common Law Direct Actions and the terms of this Order, this Court held a hearing and heard evidence on the fairness of that settlement taking into account all of the factors mandated therefor by the Second Circuit Court of Appeals;

WHEREAS, based upon this Court's familiarity with the Manville bankruptcy case since its inception in 1982, the Court's entry of the Insurance Settlement Order, the confirmation proceedings before this Court and the entry of the Confirmation Order, and the evidentiary hearing referenced above,

THE COURT HEREBY FINDS AND CONCLUDES:[1]

(a) The Statutory, Hawaii and Common Law Direct Action Settlement Agreements, as amended, are fair adequate, equitable and reasonable as to the Statutory, Hawaii and Common Law Direct Action Plaintiffs respectively;

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[1] Findings of fact shall be construed as conclusions of law and conclusions of law shall be construed as findings of fact when appropriate. *See* Bankruptcy Rule 7052.

(b) Notice of the Statutory, Hawaii and Common Law Direct Action Motions was good, sufficient and effective;

(c) The Statutory, Hawaii and Common Law Direct Action Settlement Funds are each independent entities separate and apart from the Manville Trust;

(d) The attorneys' fees to the Statutory, Hawaii and Common Law Direct Action Plaintiffs' Counsel are fair, equitable and reasonable in light of the complexity of the litigations and the size of the recoveries for the Statutory, Hawaii and Common Law Direct Action Plaintiffs respectively;

(e) The selection of the Claims Resolution Management Corporation as administrator of the Statutory Direct Action Settlement Fund and the Hawaii Direct Settlement Fund is appropriate; and

(f) The selection of Special Claims Services, Inc. as administrator of the Common Law Direct Action Settlement Fund is appropriate.

AND THE COURT HEREBY ORDERS:

1. The following pending statutory lawsuits: (i) the lawsuits consolidated under *In Re Asbestos - Unfair Trade Practices Insurance Cases,* No. 02-C-7000, Circuit Court of Kanawha County, West Virginia; and (ii) *Agnes Cashman, et al. v. Travelers Indemnity Company,* et al., Civ. A. No. 02-2056, Superior Court of Suffolk County,

Commonwealth of Massachusetts, to the extent they are asserted against Travelers, and any claims for contribution or indemnity relating in any way to the foregoing, are (a) covered by the Confirmation Order and (b) permanently enjoined as against Travelers, which were released therefrom under the Confirmation Order.

2. The *Baclaan, Toro,* and *Hopkins* complaints each specifically allege that Travelers conspired to provide false interrogatory responses concealing the fact that Combustion Engineering sold Johns-Manville asbestos products in Hawaii. *See* Complaint, *Baclaan,* at ¶¶ 28-29, 38; Complaint, *Toro,* at ¶¶ 28-29, 38; Complaint, *Hopkins,* at ¶¶ 28-29, 38. Combustion Engineering sold goods containing Manville asbestos and Manville asbestos-containing products in the United States.

3. The vast majority of Hawaii asbestos claimants, including the plaintiffs in the *Baclaan, Toro,* and *Hopkins* actions, have filed claims against the Manville Trust, and the overwhelming majority of Hawaii asbestos claimants, including the plaintiffs in the *Baclaan, Toro,* and *Hopkins* actions, were exposed to Manville asbestos.

4. The following pending lawsuits: (i) the putative class action lawsuits captioned *Lorenzo Baclaan, et al. v. Combustion Engineering, Inc., et al.,* Case No. 03-00325 United States District Court for the District of Hawaii, and *George Toro, et al. v. Combustion Engineering, Inc., et al.,* Case No. 03-00326, United States District Court for the District of Hawaii, and (ii) the lawsuit captioned *Theodore K. Hopkins, et al. v. Combustion Engineering, Inc., et al.,* Case No. 03-

00401, United States District Court for the District of Hawaii, to the extent they are asserted against Travelers, and any claims for contribution or indemnity relating in any way to the foregoing, are (a) covered by the Confirmation Order and (b) permanently enjoined as against Travelers, which were released therefrom under the Confirmation Order.

5. The pending common law lawsuits identified in Exhibit A hereto, and any claims for contribution or indemnity relating in any way to the foregoing, are (a) covered by the Confirmation Order and (b) permanently enjoined as against Travelers, which were released therefrom under the Confirmation Order.

6. The commencement or prosecution of all claims, demands, actions or proceedings against Travelers of any kind or nature whatsoever under the statutes, laws or regulations of Florida, Hawaii, Kentucky, Louisiana, Massachusetts, Montana, New Mexico, North Carolina, North Dakota, South Carolina or West Virginia arising from or relating to any acts or omissions of Travelers in (a) the handling, defense, trial, appeal or settlement or participation in the handling, defense, trial, appeal or settlement of any asbestos-related bodily injury claim, (b) disclosing, failing to disclose, suppressing, misleading, conspiring with any entity to disclose or fail to disclose, suppress or mislead or acting in concert with any entity to disclose or fail to disclose or suppress or mislead any facts, information, knowledge or beliefs about asbestos or its hazardous properties in connection with the han-

dling, defense, settlement or trial or participation in the handling, defense, settlement or trial of any asbestos-related bodily injury claim, or (c) asbestos-related claims that allege unfair competition, unfair or deceptive claims handling or trade practices, lack of good faith and fair dealing, statutory-based claims for "bad faith", actual or constructive fraud, actual or constructive breach of fiduciary duty involving, in any way, asbestos; and any claims for contribution or indemnity relating in any way to the foregoing (a) through (c), are covered by the Confirmation Order and permanently enjoined as against Travelers, which were released therefrom under the Confirmation Order.

7. The commencement or prosecution of all actions and proceedings against Travelers that directly or indirectly are based upon, arise out of or relate to Travelers insurance relationship with Manville or Travelers knowledge or alleged knowledge concerning the hazards of asbestos, including but not limited to, any and all claims or demands relating to asbestos that now or in the future allege unfair competition, unfair or deceptive claims handling or trade practices, bad faith, failure to warn, breach of any duty to disclose information, negligent undertaking, negligent or intentional misrepresentation, negligent inspection or any theory or cause of action similar to the foregoing, under any statute or common law, and any claims for contribution or indemnity relating in any way to the foregoing, are permanently enjoined as against Travelers pursuant to the Confirmation Order.

8. All actions against Travelers by past, present or future claimants who have asserted or may in the future assert claims against the Trust and who have executed releases releasing all rights and claims of any kind against Travelers whether based in tort, contract, fraud or any other legal or equitable theory and all rights or claims of any kind against Travelers allegedly resulting from exposure to asbestos and/or asbestos containing products that were manufactured, distributed or sold by Manville or any of the debtors are permanently enjoined as against Travelers pursuant to the Confirmation Order and the releases executed by such claimants.

9. Subject to Decretal Paragraph 10 below, nothing in this Order shall enjoin:

(a) the commencement and prosecution of claims against Travelers by policyholders other than Manville (or assignees of such policyholders) for insurance proceeds or other obligations arising under any policy of insurance provided by Travelers to a policyholder other than Manville;

(b) claims arising from contractual obligations by Travelers to policyholders other than Manville, as long as Travelers alleged liability or the proof required to establish Travelers alleged liability is unrelated to any knowledge Travelers gained from its insurance relationship with Manville or acts, errors, omissions or evidence related to Travelers insurance relationship with Manville; and

(c) the commencement of asbestos-related direct actions against Travelers arising out of any policy of insurance provided by Travelers to a policyholder other than Manville or involving acts or omissions in connection with such policies, provided that, prior to commencing any such action, the plaintiff shall, upon notice to Travelers, (i) make an application to this Court seeking leave to bring such action, upon representations that no allegations will be made nor evidence will be introduced relating to exposure to Manville asbestos, Travelers defense of Manville or Travelers knowledge or alleged knowledge concerning the hazards of asbestos directly or indirectly arising out of its insurance relationship with Manville, and (ii) obtain an order from this Court that the proposed direct action is not covered by the Confirmation Order, including the Insurance Settlement Order, the Channeling Injunction and this Order.

10. This Order is an order clarifying the Confirmation Order and, as provided in Paragraph 28 of the Confirmation Order, this Court retains jurisdiction to enforce this Order and to determine any and all disputes arising under this Order. All persons and entities are hereby permanently enjoined from commencing any action or proceeding as to the scope or meaning of the Confirmation Order, including the Insurance Settlement Order, Channeling Injunction and this Clarifying Order, except in this Court.

11. Nothing in this Order shall increase the liability of or assign new liabilities to the Manville Trust. The parties to the proposed settlements before the Court have agreed to the creation of three new funds. Consistent with the overall purposes of the Manville Trust and the Confirmation Order to further provide compensation to bona fide claimants and to further enhance and protect the Manville Trust:

(a) All claims, demands, actions or proceedings described in paragraphs 1 and 6 above shall be transferred, and shall attach, solely to the Statutory Direct Action Settlement Fund and shall be subject to the court-approved Statutory Direct Action Settlement Fund fund distribution procedures.

(b) All claims, demands, actions or proceedings described in paragraphs 2, 3 and 4 above shall be transferred, and shall attach, solely to the Hawaii Direct Action Settlement Fund and shall be subject to the court-approved Hawaii Direct Action Settlement Fund fund distribution procedures.

(c) All claims, demands, actions or proceedings described in paragraphs 5 and 7 shall be transferred, and shall attach, solely to the Common Law Direct Action Settlement Fund and shall be subject to the court-approved Common Law Direct Action Settlement Fund fund distribution procedures.

12. This Order and the findings contained herein are based and dependent upon the prior record in this case and the submissions and evidence presented at the evidentiary hearing conducted on July 6, 2004.

13. Other than as respects Travelers, this Order shall not be dispositive of any other motions or proceedings, or any objections to such motions or proceedings that have or may be filed.

14. Any judgment obtained against Century Indemnity Company ("Century") and/or any objecting insurer (or any of Century's or such other insurer's affiliates, related or allegedly related entities, or any defendant sued as its alleged predecessor or successor) (an "Insurer"), regardless of whether such Insurer was a settling Manville insurer, with respect to any claim asserted in any lawsuit that is enjoined as to Travelers and not enjoined as to said Insurer shall be reduced by the greater of: (a) the amount (if any) the Claimant has recovered or is entitled to recover from the Statutory Direct Action Settlement Fund and/or the Hawaii Direct Action Settlement Fund and/or the Common Law Direct Action Settlement Fund to the extent that the Insurer is entitled to such a reduction for that amount under the applicable state law; or (b) to the extent permitted under the applicable state law, the amount or percentage (up to 100%) that the Insurer would have been able to recover from Travelers, whether by contribution, indemnity or otherwise under applicable state law, had Travelers been joined in said lawsuit and/or sued for indemnity and/or contribution in a separate law-

suit. The Insurer shall, at the earliest practicable time, assert its claim for judgment reduction in the court in which judgment is sought against the insurer. If such court declines to adjudicate the judgment reduction claim, the Insurer shall promptly assert its judgment reduction claim in this Court, and this Court will adjudicate the amount or percentage of such judgment reduction. In the event such a judgment reduction proceeding is litigated in this Court, the parties shall not seek to enforce the underlying judgment until such judgment reduction proceeding is concluded.

Dated: New York, New York
August 17, 2004 at
4:50 o'clock p.m.

SO ORDERED:

/s/ Burton R. Lifland
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Nos. 82 B 11656, 82 B 11657, 82 B 11660,
82 B 11661, 82 B 11665, 82 B 11673,
82 B 11675, 82 B 11676(BRL)

August 17, 2004

IN RE JOHNS-MANVILLE CORPORATION, MANVILLE CORPORATION, MANVILLE INTERNATIONAL CORPORATION, MANVILLE EXPORT CORPORATION, JOHNS-MANVILLE INTERNATIONAL CORPORATION, MANVILLE SALES CORPORATION, f/k/a JOHNS-MANVILLE SALES CORPORATION, successor by merger to MANVILLE BUILDINGS MATERIALS CORPORATION, MANVILLE PRODUCTS CORPORATION AND MANVILLE SERVICE CORPORATION, MANVILLE INTERNATIONAL CANADA, INC., MANVILLE CANADA, INC., MANVILLE INVESTMENT CORPORATION, MANVILLE PROPERTIES CORPORATION, ALLAN-DEANE CORPORATION, KEN-CARYL RANCH CORPORATION, JOHNS-MANVILLE IDAHO, INC., MANVILLE CANADA SERVICE INC., SUNBELT CONTRACTORS, INC.,

Debtors.

Elihu Inselbuch, Caplin & Drysdale, Chartered, New York, NY, for Debtors.

David T. Austern, Manville Personal Injury Settlement, Trust, Fairfax, VA, for Trustee.

FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING TRAVELERS MOTIONS FOR APPROVAL OF CERTAIN SETTLEMENT AGREEMENTS AND FOR ENTRY OF A CLARIFYING ORDER

LIFLAND, Bankruptcy J.

WHEREAS, on June 19, 2002, The Travelers Indemnity Company, Travelers Casualty and Surety Company, and certain affiliates (as further defined in the Proposed Order) filed a Motion for Temporary Restraining Order and Preliminary Injunction (the "Motion"); and

WHEREAS, the Motion and accompanying affidavit and exhibits recounted the filing of numerous "direct action" lawsuits seeking to hold Travelers[1] liable for alleged asbestos-related personal injuries arising from (1) Travelers underwriting of insurance policies for the Debtors herein, Johns-Manville Corporation and affiliated entities (collectively, "Johns-Manville" or "Manville"); (2) Travelers investigation, defense and settlement of claims against Manville; and (3) the knowledge Travelers gained in the course of its nearly three-decades-long insurance relationship with Manville (collectively, the "Direct Action Claims"); and

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[1] "Travelers" as used herein is as defined at page 2 of the Proposed Order and in the Settlement Agreements.

WHEREAS, the Motion contended that the assertion of Direct Action Claims violated this Court's permanent injunction prohibiting "all Persons" from "commencing and/or continuing any suit, arbitration or other proceeding of any type or nature" against Travelers that seeks to collect "any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be, asserted by any Person against [Travelers] based upon, arising out of or relating to" the insurance policies Travelers issued to Manville;[2] and

WHEREAS, the Court duly considered the Motion and the attached affidavit and exhibits, and on the same date issued a temporary restraining order prohibiting further prosecution as against Travelers of certain enumerated lawsuits advancing Direct Action Claims, which order was subsequently extended to other lawsuits advancing Direct Action Claims, and has been extended in duration from time to time and is still in effect; and

WHEREAS, on August 1, 2002, after a hearing of which the pertinent parties were given notice and an opportunity to be heard, and at which the Court accepted Travelers evidence, including the expert affidavit of Professor George Priest of The Yale Law School (who was present in court and available for cross-examination), the Court referred the matter to mediation and appointed the Honorable Mario M. Cuomo, former Governor

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[2] *See* ¶ 61, *infra*.

of the State of New York, as mediator (the "Mediator"); and

WHEREAS, subsequent months of negotiations between Travelers and plaintiffs prosecuting the Direct Action Claims culminated in the execution of settlement agreements which (1) if approved by this Court, will fully and finally resolve all of the Direct Action Claims and establish compensation funds totaling $440 million; and (2) are conditioned upon the Court's entry of an Order clarifying that Direct Action Claims were enjoined under the Court's Confirmation Order and the Insurance Settlement Order incorporated there; and

WHEREAS, Travelers and the plaintiffs prosecuting Direct Action Claims filed motions seeking approval of these settlement agreements and entry of the clarifying order, which motions were the subject of broad notice to potentially affected parties (as set forth further herein), extensive briefing, argument, and an evidentiary hearing held July 6, 2004;

NOW, THEREFORE, upon due consideration of the forgoing and the record in these proceedings, including, without limitation, the Manville Second Amended and Restated Plan of Reorganization ("Manville Plan"); the order dated December 18, 1986, approving certain insurance settlement agreements (the "Insurance Settlement Order"); the order dated December 22, 1986, confirming the Manville Plan ("Confirmation Order"); the evidence adduced at the July 6, 2004, hearing and in the parties' prior extensive submissions to the Court; oral argument heard on, *inter alia,*

August 1, 2002 and July 6, 2004; and the recommendation of the Mediator, and keeping in mind that a court should not blindly accept findings of fact and conclusions of law proffered by the parties, *see St. Clare's Hospital and Health Center v. Insurance Company of North America (In re St. Clare's Hospital and Health Center*), 934 F.2d 15 (2d Cir.1991) (citing *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656, 84 S.Ct. 1044, 12 L.Ed.2d 12 (1964)), and having conducted an independent analysis of the law and the facts, the Court makes the following Findings of Fact and Conclusions of Law.[3]

FINDINGS OF FACT

I. JOHNS-MANVILLE, ASBESTOS AND TRAVELERS

A. The Universe of Asbestos Claimants Are Manville-Related

1. Fundamentally, the story of asbestos health litigation is the story of Johns-Manville. Manville was intimately involved with the mining, manufacture and distribution of asbestos from its inception:

> According to most sources, from the 1920's until the 1970's Johns-Manville was both the largest manufacturer of asbestos-containing products and the largest supplier of [raw] asbestos in the United States. . . . The company boasted in an article in *Asbestos Mag-*

[3] Findings of fact shall be construed as conclusions of law and *vice versa* as appropriate.

> *azine* in 1970, that "Johns-Manville participates in almost every facet of the Asbestos Industry and is the largest producer of asbestos-based products in the United States."

In re Joint E. & S. Dist. Asbestos Litig., 129 B.R. 710, 742 (E.D.N.Y. & Bankr.S.D.N.Y.1991) (Weinstein, J. & Lifland, J.), *vacated on other grounds*, 982 F.2d 721 (2d Cir.1992), *modified on reh'g*, 993 F.2d 7 (2d Cir.1993).

2. Henry Ward Johns had obtained a patent for an asbestos insulation product in 1868 and developed his business from asbestos deposits discovered on Staten Island in 1874. *See* W. Richard Goodwin, The Johns-Manville Story, Address delivered at the National Meeting of the Newcomen Society (Dec. 16, 1971) at 7. The Manville Covering Company, organized by Charles B. Manville in 1886, sold asbestos products of the H.W. Johns Company in the Midwest. The two companies merged in 1901 to become the H.W. Johns-Manville Company. By 1925, the company's sales had increased to nearly $40 million per year, and Manville asbestos was used to roof many houses and insulate pipes after World War I. *See id.* at 8; *see also* Dunbar Decl., Tab A (Ex. 22), Expert Report of Frederick C. Dunbar ("Dunbar Report") at 1-2.

3. By 1970, Manville was reportedly the world's largest producer of raw asbestos operating with mines in Quebec, California, Newfoundland and Ontario, including one in Asbestos, Quebec touted as "the largest in the free world." Manville shipped its raw asbestos to other manufacturers

of asbestos-based products in 58 countries. *See* Goodwin, Manville Story at 11-12. Indeed, Manville was *the* prime supplier of asbestos fiber products and distributed its products across the entire spectrum of industries and employment categories subject to asbestos exposure. In fact, there are no industries from which claimants originate where Manville did not provide asbestos products—either manufactured or raw materials. Thus, the range of products containing Manville asbestos is extremely broad and practically immeasurable.

4. Manville produced a wide array of asbestos-containing products for industrial uses, including pumps, gaskets, asbestos textiles, brake linings, brake shoes for the Metroliner trains, cements and insulations for heating systems, insulations for aircraft and aerospace industries, asbestos cement and insulated pipes, and construction materials such as acoustic ceiling panels. *Id.* at 12-13. Moreover, Manville manufactured its products for very long periods of time, often through the whole twentieth century up until it stopped making asbestos products in the mid-1970's.

5. As the Court has previously observed:

> During its heyday, Manville marketed more than 500 different lines of products manufactured at the company's 33 plants and mines located throughout the United States and Canada. . . . In its Product Handbook, Manville projected that its asbestos mill in Quebec, built in the mid-1950's would have "full production capacity . . . greater than

> one-third the free world's supply of asbestos fibre," and that the mine was "the largest mine in the world for the production of asbestos fibre." Similarly, Manville proudly announced that it was a "leader in [the asbestos floor tile] industry since it was started on a wide commercial basis."
>
> Products of Johns-Manville saw widespread commercial, industrial and consumer use. In particular, its "85 percent magnesium" products were used extensively in shipyards in the years leading up to and during World War II. Johns-Manville was allegedly one of the few manufacturers that utilized crocidolite-type asbestos fibre in any significant quantity especially after 1945. . . . Significant medical data suggests, as already noted, that crocidolite fibers present greater dangers than other forms of asbestos, particularly in connection with the deadly asbestos-induced cancer, mesothelioma.

In re Joint E. & S. Dist. Asbestos Litig., 129 B.R. at 743.

6. The Court received testimony from David Austern, who, in addition to serving as the President of the Claims Resolution Management Corporation, has been the General Counsel of the Manville Personal Injury Trust ("Manville Trust") for 17 years and has represented the Manville Trust in a variety of litigations. Austern Decl. [Ex. 27] ¶¶ 1-3. A recognized expert on the subject of Manville, the operation of the Manville Trust and asbestos litigation, Mr. Austern has repeatedly testified about asbestos-related issues before

various courts and Congressional committees and has lectured at 21 symposia or seminars on the subject of asbestos claims. *Id.* ¶ 3.

7. In this proceeding, Mr. Austern testified, among other things, that Manville was the largest producer of asbestos in the United States:

> In addition to mining asbestos and manufacturing asbestos containing products, Manville sold asbestos fiber to virtually every other manufacturer of asbestos products. At times, and for some industries, Manville supplied between 50 and 80% of the raw asbestos fiber used by asbestos product manufacturers in the United States.
>
> * * *
>
> From blankets to brakes, floor tiles to roofing shingles, and insulation for homes, autos and ships alike, Manville made asbestos containing products in nearly every category for nearly every use for which asbestos products were deemed advantageous.

Id. ¶¶ 4-5.

8. Mr. Austern further testified that the Claims Resolution Management Corporation ("CRMC") maintains a document resource center containing nearly 4.2 linear miles of Manville documents relating to asbestos, many of them sales records, which show "Manville sold asbestos and/or asbestos-containing products in all 50 states and 21 foreign countries. Manville had well over 50% of the U.S. market, and in some areas 75 to 80% of the market." *Id.* ¶ 6.

9. Mr. Austern testified that the Manville Trust maintains "the largest and most comprehensive asbestos claims database, encompassing over 260 fields of detailed information regarding more than 740,000 asbestos claims." *Id.* ¶ 11. The Trust's database tracks "litigation each [Manville] claimant has filed against any other asbestos defendant, including the jurisdictions in which such litigation was filed," and a comparison of the Trust's database with similar databases of Owens Corning, Combustion Engineering, MacArthur Corporation, Babcock & Wilcox, Certain Underwriters at Lloyds, Fbreboard and an unidentified client of Milliman U.S.A. revealed a "degree of overlap [that] is nearly complete." *Id.* ¶¶ 11-13.Based on these facts and others detailed in his testimony and garnered in his many years of experience, Mr. Austern concluded:

> *In essence, the class of current and potential future asbestos plaintiffs is the same population as the class of current and potential future claimants against the [Manville] Trust.*Trust data has been used by several actuarial firms and other consultants as a basis for predicting the total anticipated number of future asbestos claimants in this country. Claims against the Trust are an established proxy for the universe of all asbestos claims against all defendants.

Id. ¶ 17. (emphasis added).

10. The Court also credits the expert testimony of Dr. Frederick C. Dunbar, an experienced economist who specializes in the evaluation and assessment of liabilities associated with products

that are the focus of mass tort litigation. Dunbar Decl. ¶ 5. Dr. Dunbar—a recognized leader in his field—testified that "Manville was the largest producer of asbestos-containing products and its product line was large and widely diversified. . . . Manville not only produced asbestos-containing products, it also supplied raw asbestos to other producers (its competitors)." *Id.* ¶¶ 10-11. Manville's products were dispersed across the entire spectrum of industries and employment categories subject to asbestos exposure. *Id.* ¶ 12. Based on sound, established and scientifically valid methodology, Dr. Dunbar provided testimony to the effect that, in essence, "Manville asbestos claimants represent the universe of asbestos claimants." *Id.* ¶ 13.

11. This unrebutted-indeed, undisputed[4] evidence of the breadth and length of Manville's asbestos involvement compels the conclusion, as a factual matter, that essentially all potential asbestos claimants—including all plaintiffs with Direct Action Claims—have been exposed to Manville asbestos through Manville's pervasive asbestos mining, processing and manufacturing activities.

B. Travelers Thirty Year Involvement With Manville

12. "'Travelers Insurance Company was the primary insurer for Johns-Manville Corporation for

[4] Despite having two years to conduct discovery and ample time to adduce any evidence to the contrary, not a single objector at the hearing rose to cross-examine Dr. Dunbar or Mr. Austern when given the opportunity.

each year from 1947 through 1976." *In re Johns-Manville Corp.*, 33 B.R. 254, 260-61 (Bankr. S.D.N.Y.1983); *accord* Munroe Decl. ¶ 5. In addition to providing 29 years of primary comprehensive general liability coverage, Travelers issued over 425 other policies to Manville, including but not limited to workers compensation policies, boiler and machinery policies, employers' liability policies, manufacturers and contractors liability policies, owners and contractors protective liability policies, owners, and landlords and tenants general liability policies. *See* Affidavit of Barry Ostrager, dated June 18, 2002 ("Ostrager Aff.") Ex. A at Ex. A-1. Each of those policies was made a part of the Insurance Settlement Agreement. *Id.*

13. Travelers first Manville policy was issued in 1947—well before asbestos became a household word. The Travelers/Manville relationship continued uninterrupted throughout the 1950s (when asbestos lawyers claim that certain workers compensation claims should have put the asbestos industry on notice of the mineral's health hazards), the 1960s (when Dr. Selikoff released his groundbreaking study on the cancer risks for asbestos insulators), and the 1970s (when the intermittent trickle of asbestos litigation became a rushing tide as a result of *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir.1974), and *Karjala v. Johns-Manville Prods. Corp.*, 523 F.2d 155 (8th Cir.1975)). *See, e.g.*, Munroe Decl. ¶¶ 24-27 (discussing the Selikoff study and the reaction it caused at Manville and-by extension-Travelers); Parnell Decl. ¶ 8 (same, as to the *Borel* decision).

i. Travelers Learned About The Risks Of Asbestos From Manville

14. In the course of any insurance relationship, an insurer attempts to learn about the risks that it is insuring and derives knowledge from both the claims and underwriting functions. At the underwriting stage, the insurer relies on the insured to provide information about the insured's business, products, claims history and other information relevant to the insured's risk, so that an appropriate premium and the terms and conditions of coverage can be agreed upon. Priest Decl. ¶ 11.

15. Here, Travelers and Manville would have reevaluated their relationship every year for 29 years as a part of the process of assessing and underwriting the risk. Travelers would have learned about Manville's business so it could quantify the risks and make educated judgments about whether to underwrite, and if so at what cost. Priest Decl. ¶ 21.

16. Examples of the type of information Travelers received in connection with its underwriting the Manville policies is memorialized in Travelers contemporaneous documents presented at the hearing:

> An evaluation prepared by Travelers for purposes of underwriting Manville's 1973 insurance program, which assessed the risks presented by Manville's operations in Long Beach, California—including the degree to which employees were exposed to asbestos. Munroe Decl. Tab E (Ex. 57).

A number of "Industrial Hygiene Survey Reports" demonstrating the types of inspections Travelers performed of Manville's Pittsburg Plant, including a discussion of the presence of asbestos at the plant and the fact that respirators were not in use. Munroe Decl. Tab F (Exs.32-36).

A 1969 memorandum authored by a Travelers Engineering Supervisor warning of a "serious loss potential involving the asbestos industry, relative to the workman's and general public exposure to asbestos dust," which was "first brought to [Travelers] attention in December, 1966 by . . . Manville." Munroe Decl. Tab I (Ex. 51).

17. After the underwriting of the insurance policies, under established insurance law and practice, a wide array of conduct flows from the insurance policies, particularly primary comprehensive liability policies like those issued by Travelers to Manville beginning in the 1940s. This is because of the language of the policy, which imposes in the event of a covered loss a duty to defend the policyholder (Manville), as well as established insurance law, which provides further duties, such as the duty of confidentiality and duty of good faith and fair dealing recognized by most jurisdictions. Priest Decl. ¶ 47.

18. In connection with services provided to Manville relating to the Policies, as early as 1947 and late as the 1970s, Travelers, in its role as Manville's insurer, assisted Manville in identi-

fying asbestos dust hazards and establishing dust control programs. Travelers proffered numerous exhibits at the July 6 hearing illustrating such activities, including Industrial Hygiene Survey Reports, memoranda concerning Travelers involvement in the collection of dust samples and other documents relating to surveys and inspections performed by Travelers in accordance with the policies. *See* Munroe Decl. ¶¶ 21-22 & *id.*Tabs F & E (Exs.32-36, 57).

19. Travelers agreed to and did inspect certain Manville plants, test the levels of asbestos dust at Manville facilities, and evaluate workers' asbestos exposure, pursuant to its underwriting activities and because it retained the right to inspect Manville's facilities under the policies. Munroe Decl. ¶ 20.

20. During the 1960s and 1970s, Manville and Travelers generated correspondence and memoranda relating to asbestos, particularly after the publicity that arose as a result of the watershed paper presented by Dr. Irving Selikoff regarding the health effects of asbestos. Munroe Decl. ¶¶ 23-25. Travelers and Manville had meetings to discuss these developments. *Id.* Tabs N & L (Exs.43, 44, 46).

ii. Travelers Defense Of Manville Was A Key Source Of Asbestos Information

21. Manville represented the earliest and largest number of asbestos claims filed against any of Travelers policyholders. As set forth below, as Manville's primary insurer, Travelers

paid for the defense of Manville in asbestos litigation, received reports about the litigations and the evidence elicited therein, and consulted with Manville regarding the defense of cases. Throughout, Manville defended the asbestos cases in the context of joint defense agreements with other defendants, which provided for confidentiality and privilege in accordance with prevailing law. A great deal of information was exchanged among these defense groups and their insurers and between Manville and Travelers.

22. Albert Parnell, one of Manville's lead defense counsel paid by Travelers to defend Manville from the mid-1970s through the time of Manville's bankruptcy filing in 1982, gave persuasive and unrebutted testimony regarding the history of asbestos litigation—which is in large part the history of litigation against Manville —as well as the close relationship that necessarily developed between Travelers and Manville in the course of their insurance relationship. Parnell Decl. ¶¶ 4-6. Mr. Parnell is a particularly significant witness because of his contact with all of the principal Travelers managers and the concomitantly broad basis upon which his knowledge of Travelers knowledge rests. *See id.* ¶ 27.

23. Mr. Parnell provided a thorough account of the history of asbestos litigation, in particular the genesis of the litigation against Manville:

> The explosion of asbestos litigation against Johns-Manville began following the Fifth Circuit's *Borel* decision, which for the first time applied strict liability to asbestos producers. Prior to that decision, asbestos liti-

> gation was largely limited to individual workers compensation claims. *Borel* opened the door to the filing of large numbers of actions by third-party plaintiffs injured by exposure to asbestos. Manville, as a defendant in the *Borel* case, was indemnified and defended by Travelers.

Id. ¶ 8.

24. After *Borel*, Manville was named as a defendant in virtually every asbestos-related personal injury or wrongful death action filed in the United States. *Id.* ¶ 9. Manville was the primary target of asbestos plaintiffs because of Manville's ubiquity in the asbestos context, having manufactured hundreds of products over many years and having been the leading supplier of asbestos. *Id.* ¶¶ 11. Moreover, Manville's trademark and unique packaging was readily identifiable to plaintiffs and their attorneys. *Id.* ¶ 11.

25. Manville was also the primary target of asbestos plaintiffs because damaging evidence developed in the early years of asbestos litigation left Manville uniquely vulnerable to liability and punitive damages. "Indeed, plaintiffs' lawyers *to this day* attempt to recycle much of the damaging Manville evidence against new generations of asbestos defendants through latter-day allegations of conspiracy with Johns-Manville." *Id.* ¶¶ 13, 31 (emphasis in original).

26. Manville's status as the premier asbestos defendant also derived from its unique vulnerability to plaintiffs' failure to warn claims:

> In response to Manville's assertion of the "state-of-the-art defense" that it lacked knowledge of the hazards of asbestos until the mid-1960s, plaintiffs produced medical literature derived from publicly available sources dating back to the turn of the century and continuing into the 1930s, and beyond, that demonstrated a causal connection between asbestos and disease among asbestos and textile workers. Plaintiffs used this literature (and Manville's knowledge of it) to attack the state-of-the-art defense. In a similar vein, as the industry leader Manville sponsored industrial hygiene studies concerning asbestos and asbestos dust and, the plaintiffs argued, conspired to suppress the results of these studies from asbestos workers. For example, plaintiffs adduced evidence that Manville sponsored a 1930 study of mine workers at a Canadian subsidiary that showed as many as half of all its workers had developed asbestosis due to exposure to asbestos dust.

Id. ¶ 14; *see also id.* ¶ 13.

27. An especially critical body of evidence against Manville was happened upon early in the era of asbestos litigation, when plaintiffs uncovered the so-called "Sumner Simpson Papers," a series of letters between Sumner Simpson, President of Raybestos-Manhattan, and Vandiver Brown, a Manville attorney:

> The correspondence suggested that Raybestos and Manville were aware of the hazards of asbestos and that Simpson and Brown sought

> to minimize publicity regarding asbestosis by suppressing data and articles that otherwise would have been published in the trade journal "Asbestos." These documents also suggested that Mr. Brown may have encouraged a doctor to downplay his 1931 findings about the adverse effects of asbestos dust on the lungs of asbestos workers. Together, these documents quickly formed the basis for allegations that Manville participated in a coordinated conspiracy to suppress the hazards of asbestos.

Id. ¶ 15.

28. The evidence against Manville steadily mounted. Former Manville employees-including physicians employed by Manville-provided deposition and trial testimony that plaintiffs claimed showed: an awareness by Manville of the asbestos health risks as early as the 1940s; the difficulty of controlling asbestos dust; and Manville's suppression of information and failure to warn its workers and the public. Particularly damaging testimony purported to describe a policy and practice at Manville of requiring plant physicians to hide adverse test and x-ray results from their patients, the plant employees, out of a concern that Manville would lose manpower. *Id.* ¶ 16.

29. Kathleen Munroe, a longtime Travelers employee who headed the company's Asbestos Unit (a specialized division within Travelers formed to centralize all asbestos litigation against the company's insureds) and who supervised the defense efforts of Parnell and others,

testified extensively and credibly regarding the consequences of Travelers longstanding, close relationship with Manville. She explained:

> Manville, beginning in the late 1960's, tendered the defense of virtually every one of its third party asbestos lawsuits to Travelers, and Travelers funded Manville's defense efforts virtually *in toto*, including Manville's defense of *Borel*, *Tomplait* and *Karjala*, three of the first third-party asbestos lawsuits filed in the United States. From the late 1960's through Manville's bankruptcy filing, Travelers paid millions of dollars in counsel fees incurred in answering interrogatories and responding to document requests served on Manville, defending Manville witnesses at deposition, drafting legal memoranda, negotiating settlements on Manville's behalf and defending Manville at trial and on appeal in asbestos-related suits.

Munroe Decl. ¶ 6.

30. Ms. Munroe worked on the Manville account throughout the 1970s and 1980s and spent virtually all of her time from 1978 until Manville's primary products liability coverage was exhausted handling asbestos claims filed against Manville. *Id.* ¶¶ 2-3. Her testimony—which was based on both her extensive personal experience handling Travelers defense of Manville claims and on a number of documents from Travelers files accepted into evidence in this proceeding—was wholly unrebutted.

31. Ms. Munroe explained that Travelers Claims Examiners dedicated to the Manville account were required to—and did—review complaints filed against Manville, pay and work with defense counsel litigating on behalf of Manville and became familiar with Manville's asbestos history and business operations, as well as Manville's defenses to liability, such as state of the art:

> As part of my responsibilities, I regularly received documents pertaining to asbestos related issues as part of the normal claims handling process. As discussed further below, in order to fulfill Travelers defense responsibilities under the Manville policies, I needed to be aware of Manville's knowledge regarding the hazards of asbestos (at least what was conveyed to me by Manville or its counsel) and the issues that Manville was facing in the litigation.

Id. ¶ 4; *see also id.* ¶ 14.

32. Manville's assertion of the state of the art defense in particular required Travelers to learn information about Manville's asbestos claims and its historic dealings with asbestos, including files relating to Manville's knowledge and understanding of the hazards of asbestos. *Id.* ¶ 15. To this end, "Travelers organized a number of seminars at which Manville and its national coordinating counsel educated Travelers and local defense counsel as to Manville's history and its experience with asbestos."*Id.* ¶ 16. These seminars involved detailed presentations by Manville representatives regarding Manville's extensive

research and analysis of asbestos hazards, and "whether and to what extent Manville could assert the 'state of the art' defense to liability." *Id.* In short, it was "[t]hrough Manville" that "Travelers became experienced in the handling of asbestos cases." *Id.* ¶ 14.

33. Travelers duties under the policies also required it to settle and pay claims where appropriate. Ms. Munroe testified regarding her personal negotiation of numerous settlements on behalf of Manville, all of which were undertaken in her capacity as a claim representative for Travelers. One of the settlements she negotiated was among the first bulk settlement for Manville with Ron Motley of the Ness, Motley firm (as it was then known) in a group of cases in South Carolina. *Id.* ¶ 18.

34. In order to engage in such negotiations—and evaluate whether (and for how much) to settle—Travelers claims representatives were apprised of the nature of the claims that plaintiffs were asserting against Manville, the strengths and weaknesses of plaintiffs' cases, and the validity and persuasiveness of Manville's defenses. *Id.*

35. Travelers paid for Manville's defense until coverage was exhausted, *id.* ¶ 6, employing numerous claims examiners to work full-time on Manville asbestos claims, *id.* ¶ 7." No other Travelers insured with asbestos-related claims commanded as much work" as those dedicated to Manville. *Id.*

36. Ms. Munroe's testimony and the documentary record of internal Travelers materials from

that era demonstrates that Travelers believed such extensive resources were warranted because —from the very outset of asbestos litigation —Manville's prominence and ubiquity made it the primary target of the plaintiffs' bar. *Id.* ¶ 8.

> In each of the thousands of asbestos cases in which it was sued, Manville faced significant exposure and was assessed or held responsible for the largest share of any settlement or verdict. While several other defendants that were insured by Travelers were able to obtain voluntary dismissals or early, discounted settlements because of questionable product identification, Manville's asbestos fiber and products had been distributed so widely that it tended to be the last defendant involved in the proceeding and often the only defendant to proceed to trial.

Id. ¶ 9.

37. Ms. Munroe explained that Manville recognized early in the litigation that coordination among asbestos defendants would inure to its benefit:

> Manville thus took the lead in organizing joint defense groups to coordinate the defense of asbestos-lawsuits. Company-specific information was not shared in these groups, but defendants did discuss common strategy and settlement issues. Because Manville was the primary target of every case and because Manville was often the last defendant left at trial after other defendants had settled or been voluntarily dismissed,

> the Manville attorneys typically took a leading role in pending proceedings, served as lead counsel on joint defense issues and also served as liaison counsel when the court requested that defendants appoint a single spokesperson.

Id. ¶ 10.

38. Manville's leading role—and the high stakes it faced in each case—allowed co-defendants to repose in Manville's efforts, with Manville counsel leading joint defense efforts (including discovery, briefing of common legal issues, and serving as lead trial counsel). *Id.* ¶ 11. Further, Manville representatives-including Travelers-participated in all joint settlement negotiations. *Id.*" In the minority of cases in which Manville settled before other defendants, plaintiffs sought to dismiss lawsuits against Manville to remove Manville's defense team, which was considered the most knowledgeable and experienced in asbestos defense." *Id.* ¶ 11.

39. Ms. Munroe's testimony—persuasive enough in its own right—was buttressed with a wealth of documentary evidence that provides even further context. Among the documents presented for the Court's consideration were:

> Summaries of discussions between Manville and Travelers detailing a 1964 conversation about occupational hazards of asbestos and medical studies concerning asbestosis, a 1966 discussion relating to an asbestos-related workers compensation claim, and a 1968 discussion relating to a mesothelioma claim.

A 1978 overview of asbestos litigation for the Chairman of Travelers and various other high-level officers and that focuses exclusively on Manville.

See Id. Tabs B-O (Exs. 70, 52, 54, 57, 32-36, 79, 31 & 39, 51, 40, 81, 46, 45, 43 & 44, 80).

40. This last document is particularly telling:

"Because of the leadership position held in the industry, Johns-Manville has been targeted by plaintiffs in most, if not all of the pending asbestos litigations. In those few suits that have been tried to a conclusion, Johns-Manville has been forced to supply most of the expert witnesses and to carry the bulk of the defense, since they are the primary target in most of this litigation. In addition, attempts have been made by codefendants in this litigation to hold Johns-Manville solely responsible. Johns-Manville has conducted most of the medical research on the part of the asbestos industry and was the first to add warnings about the potential dangers of this product as part of its product labeling. Despite this fact the Johns-Manville Corporation has been marked as the villain both by plaintiff and codefendant alike."

Id. Tab B (Exhibit 70 at T1564373-74).

41. These internal Travelers memoranda confirmed that asbestos and Manville were inescapably linked for a variety of reasons, such as Manville's dominance as a manufacturer and seller of raw asbestos and asbestos-containing products and its prominence in the litigation.

These documents confirm what is intuitively obvious to anyone involved at the time, namely that from Travelers perspective, issues relating to asbestos and the hazards of asbestos and asbestos litigation went hand-in-hand with Manville, the largest manufacturer of asbestos, target defendant, and long-time Travelers insured. Munroe Decl. ¶ 27, 31.

42. Other companies were named as defendants in asbestos suits then as they are now. But their limited market share (and the related issue of difficult product identification), as well as Manville's status as a particularly easy target—with deep pockets and the potential problematic evidence available against it—resulted in these other defendants taking a more circumscribed role in the defense of cases, as well as being voluntarily dismissed or settling early for modest sums. Parnell Decl. ¶ 17.

43. Manville, in turn, was required to assume the leading role in the defense of cases in which it was named as a defendant—which, of course, was essentially every asbestos case filed in the United States. Manville had assembled a significant legal team and was far more prepared to defend cases on the merits, often taking them to trial. This required Manville's lawyers to familiarize themselves with all aspects of the defense of asbestos personal injury claims—including the historical scientific record pertaining to the hazards of asbestos, as well as Manville's institutional knowledge of that record—and to develop experts, sponsor the state of the art defense and act in a coordinating capacity for other asbestos

defendants to ensure a unified, industry-wide defense. *Id.* ¶¶ 18-21.

44. Perhaps the best indication of the importance of Manville to the plaintiffs bar, however, is the fact that—notwithstanding its bankruptcy and resulting immunity from suit—asbestos plaintiffs still litigate against the "ghost" of Manville by attempting "to place asbestos defendants into the shoes of Manville through 'conspiracy' theories to tarnish the defendants with the old and damaging Manville evidence discussed above":

> As pithily phrased by one prominent asbestos plaintiffs' lawyer from Texas (who is counsel in some of the common law cases against Travelers), "if a plaintiff can successfully assert the conspiracy cause of action, *he can hold solvent defendants liable for the sins of Manville, Raybestos-Manhattan and a host of insolvent entities.*" By asserting broad conspiracies with Manville, plaintiffs hope to expand the universe of asbestos defendants to "hundreds of formerly 'peripheral' companies" and to breathe new life into asbestos litigation "in the 21st century."

Id. ¶ 30 (quoting W. Mark Lanier, *Conspiracy Theory: Putting New Defendants In Manville's Chair*, Asbestos L. & Litig., ALI-ABA, Dec. 6-7, 2001 (Am.L.Inst.2001)) Ex. 18 (emphasis added).

45. Indeed, Mr. Parnell testified that based on his personal knowledge and experience in defending asbestos cases for the past 30 years, Mr. Lanier's suggested strategy has been widely followed by the asbestos plaintiffs' bar, and that

plaintiffs' lawyers routinely introduce much of the damaging Manville evidence—such as the Sumner Simpson Papers—against today's asbestos defendants. "It is very common for complaints to name Manville and assert Manville-related conspiracy allegations in the body of such complaints despite the fact that Manville cannot be sued in the tort system." *Id.* ¶¶ 30-31.

46. The evidentiary basis for asserting a conspiracy theory between Manville and a solvent company may, according to Mr. Lanier, be based on "[r]elatively innocuous things like one asbestos company investing in another or being present at meetings with Manville representatives," all of which "can be portrayed as sinister combinations designed to defraud workers."If this type of "evidence" has value to plaintiffs, facts based on the course of Travelers 29-year insurance relationship with Manville undoubtedly would be relied upon by plaintiffs. Priest Decl. ¶ 51.

iii. Travelers Knowledge Of The Hazards Of Asbestos Arise From, Are Based Upon And Relate To Its Obligations Under The Policies It Issued To Manville

47. Travelers knowledge of the hazards of asbestos was derived from its nearly three decade insurance relationship with Manville and the performance by Travelers of its obligations under the Policies, including through the underwriting, loss control activities, defense obligations and generally through its lengthy and confidential

insurance relationship under the policies. Munroe ¶ 38; Parnell ¶ 32 ("Based on my relationship with Travelers and my knowledge of the Manville account, I believe that Travelers knowledge of the hazards of asbestos is necessarily intertwined with its insurance relationship with Manville and its obligations under the insurance policies it issued to Manville. That knowledge would have been derived from a number of contexts as explained above, including through Travelers defense obligations and generally though its lengthy and confidential insurance relationship under the Manville policies."); *see also* Priest ¶ 16 ("Given Travelers lengthy insurance relationship with Manville and its role in providing for Manville's defense when the company was faced with an onslaught of asbestos-related personal injury claims, and the significance of Manville in terms of asbestos litigation and the prevalence of asbestos and asbestos-containing products, in my opinion Plaintiffs' allegations are based upon Travelers insurance relationship with Manville and its obligations under the policies."); 7/6/04 Tr. at 33 (the factual allegations against Travelers "inescapabl[y]" relate to its relationship with Manville) (testimony of Prof. Priest).

48. In short, the evidence adduced at the hearing—particularly the testimony of Messrs. Parnell and Priest and Ms. Munroe—persuasively demonstrates that in connection with its insurance relationship with Manville, Travelers gained knowledge of asbestos and asbestos-related health litigation through its underwriting of the Manville policies, inspection of Manville

plants, investigations of asbestos-related claims against Manville, defense of lawsuits against Manville, and negotiations of settlements of asbestos-related lawsuits against Manville. Every dollar paid by Travelers on account of Manville—whether to Manville itself, to outside defense counsel hired to defend Manville, to Travelers employees inspecting or investigating Manville facilities or claims, or to asbestos claimants in satisfaction of judgments against or settlements with Manville—correlated to a specific provision in the policies that Travelers issued to Manville. *See generally* Priest Decl. ¶¶ 18-28 (describing the extensive duties assumed when an insurer underwrites a risk).

49. During argument and in cross-examination, objectors referenced other Travelers policyholders with asbestos-related liability. Tellingly, other than acknowledgement of the undisputed fact that there were other such insureds, the Court was not presented with a scintilla of evidence regarding the scope, duration or intensity of any such relationship. Nor has any evidence been presented that even calls into question Travelers extensive showing regarding the centrality of Manville to the asbestos crisis, the company's potential exposure as a result of its intimate involvement with all aspects of asbestos mining and manufacturing, the sheer volume of cases against Manville, and the longstanding relationship between Travelers and Manville. *See also* Munroe Decl. ¶ 12 ("No other Travelers policyholder was sued in the number of asbestos cases in which Manville was named. No other

Travelers policyholder had been involved with asbestos as prominently and extensively as Manville. No other Travelers policyholder assumed such a prominent leadership role in the formulation of cooperative efforts to defend asbestos-related litigation."). Moreover, on cross-examination, Professor Priest a recognized expert in insurance litigation, testified that the relevant factual allegations in the Direct Action Claims against Travelers "inescapabl[y]" relate to its insurance relationship with Manville. 7/6/04 Tr. at 33. His testimony was unrebutted.

50. Given the extensive and unrebutted evidence that no other Travelers policyholder was sued in the number of asbestos cases in which Manville was sued, no other Travelers policyholder commanded the degree of Travelers resources as Manville, no other Travelers policyholder was involved with asbestos as prominently and extensively as Manville had, and no other Travelers policyholder assumed such a prominent leadership role in the formulation of cooperative efforts to defend asbestos-related litigation as Manville did, the Court concludes as a factual matter that Manville was without peer among Travelers insureds and that Travelers learned virtually everything it knew about asbestos from its relationship with Manville.

II. THE MANVILLE BANKRUPTCY

51. The Manville bankruptcy filing was simply without precedent. *See, e.g., Kane v. Johns-Manville Corp.*, 843 F.2d 636, 638 (2d Cir.1988) (describing Manville as "one of the nation's most

significant Chapter 11 bankruptcy proceedings"); *In re Johns-Manville Corp.*, 68 B.R. 618, 624-25 (Bankr.S.D.N.Y.1986), *aff'd*, 78 B.R. 407 (S.D.N.Y.1987), *aff'd*,843 F.2d 636 (2d Cir.1988) ("[T]his court, this Debtor, and the parties in interest have had to address societal, legal and economic issues on a scale heretofore unknown to Title 11 proceedings.").

52. The "ultimate challenge" facing the Court, Manville, and the parties in interest was the crafting of "a plan of reorganization for the Debtors which would provide for payment to holders of present or known asbestos health related claims . . . and those persons who had not yet manifested an injury but who would manifest symptoms of asbestos-related illnesses at some future time"—and to do so using only the broken shards of a Fortune 500 company that had been crushed by the weight of a century-long entanglement with asbestos. *In re Johns-Manville Corp.*, 97 B.R. at 176.

53. Early in the reorganization process, the Court recognized that the fundamental precept of a Manville reorganization was obtaining funds through a settlement with Manville's insurers. *In re Johns-Manville Corp.*, 33 B.R. 254, 267 (Bankr.S.D.N.Y.1983).

54. There were several obstacles. These included finding a way to incentivize the insurers such as Travelers to settle, given that Manville and its insurers were locked in a contentious, costly and time-consuming coverage dispute. *E.g.*, *In re Johns-Manville Corp.*, 33 B.R. at 267 & 270 (observing the uncertainty in value of the

policies given that "Travelers may be able to establish in the California litigation that Manville is not entitled to coverage under its policies"); *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 90 (2d Cir.1988) (noting the "extensive litigation [between Manville and] its insurance carriers concerning its coverage for asbestos-related liabilities").

55. Travelers also was enmeshed in direct action litigations in Louisiana, where certain Manville factory workers contended that they should be able to recover directly from Travelers by virtue of its insurance relationship with Manville. *See, e.g., Wedgeworth v. Fibreboard Corp.*, 706 F.2d 541, 546-48 (5th Cir.1983) (discussing direct action claims by Manville factory workers against Travelers); *In re Johns-Manville Corp.*, 33 B.R. at 264 (ordering that "[a]ll entities are hereby stayed, restrained and enjoined from commencing, conducting or continuing any suits against any past, present or future officer, director or employee of Manville *or against their insurers* in direct action suits whether such direct action suits arise by statute or at law or in equity") (emphasis added).

56. Additionally, Travelers faced claims from vendors of Manville products, who claimed that Travelers owed duties arising out of its insurance policies and relationship with Manville. *See, e.g., MacArthur*, 837 F.2d at 90-91 (discussing one such claim).

57. Finally, there were a host of contribution claims, cross claims and indemnity claims between and among virtually every company that

had insured Manville in its long history. *Cf., e.g.*, Ostrager Aff. Ex. A ¶ 5(a) (referencing "indemnification, contribution or other reimbursement based upon, arising out of or related to any or all of the Policies").

58. Ultimately, the Court facilitated a consensual resolution whereby Travelers paid nearly $80 million into the bankruptcy estate (in addition to the $20 million already paid in litigation against Manville) in exchange for a full and final release of Manville-related claims. In order to achieve this resolution, Travelers insisted on finality and a full and complete release of liabilities that were in any way related to or based on Manville.

A. The Entry Of The Insurance Settlement Order And The Confirmation Order

59. Numerous objections to the Manville-Travelers settlement were filed. The grounds ran the gamut: some claimed the settlement was "aleatory," others claimed it was "illusory"; still others claimed it was "vague" and "non-binding." *See* Manville Memorandum dated Mar. 18, 1985 (attached as Ex. A to SCB's June 28, 2004 objection) at 7, 9, 11, 16.

60. After full consideration of all objections, and after an extensive series of hearings and oral arguments on the feasibility, fairness and appropriateness of the settlement, the Court overruled the objections, approved the settlement agreement, and entered the necessary orders to fully and finally extricate Travelers from the Manville

morass. The settlement, which the Second Circuit has recognized as the "cornerstone" of the Manville reorganization," *MacArthur*, 837 F.2d at 90, has been final for two decades.

61. The Insurance Settlement Order consisted of an interlocking web of protections:

> The *channeling* of all claims to the Manville Trust: "any and all claims . . . based upon, arising out of, or related to any or all of the Policies . . . are transferred, and shall attach, solely to the Settlement Fund. . . ." Ostrager Aff., Ex. D at 1.2(B), 2.2(B), 23.2(D).
>
> The *release* of the settling insurers: "Settling Insurer Group shall have no further duties or obligations based upon, arising out of or related to the Policies and shall thereafter be released from any and all Policy Claims. . . ." Ostrager Aff., Ex. D at 1.2(C), 2.2(C); *accord id.* at 23.2(E).
>
> A *permanent injunction*, specifically prohibiting all future claims for bad faith or insurer misconduct: "all Persons are permanently restrained and enjoined from commencing and/or continuing any suit, arbitration or other proceeding of any type or nature for Policy Claims against any or all members of the Settling Insurer Group. . . ." Ostrager Aff., Ex. D at 23.2(F); *accord id.* at 1.2(D), 2.2(D).

62. The core defined term in this matrix—"Policy Claims"—is comprehensive in scope, including:

> any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be, asserted by any Person against any or all members of the JM Group or against any or all members of the Settling Insurer Group based upon, arising out of or relating to any or all of the Policies.

Ostrager Aff., Ex. D at 23.1.

63. The Insurance Settlement Order was specifically incorporated into the Confirmation Order. Ostrager Aff. ¶ 14, Ex. F at Finding (gg).

64. Moreover, the Confirmation Order permanently enjoins "all persons" from commencing any action against any of the Settling Insurance Companies "for the purpose of, *directly or indirectly,* collecting, recovering or receiving payment of, on or with respect to any Claim . . . or Other Asbestos Obligation. . . ." Ostrager Aff., Ex. F at Decretal 29 (emphasis added).

B. Claims Against The Manville Trust

65. Because of the insurance settlements, the Trust has already distributed billions of dollars to asbestos victims:

> The Trust has received more asbestos claims than any defendant in the tort system, and more asbestos claims than any other asbestos trust. By a recent count, the Trust has received over 740,000 claims, and it contin-

> ues to receive record numbers of claims. The Trust received almost 91,000 claims in 2001, 56,000 claims in 2002, and 101,000 in 2003. To date, the Trust has paid over 606,000 claims totaling approximately *$3.2 billion*.
>
> Austern Decl. [Ex. 247] ¶ 10 (emphasis added). Professor Priest has testified that "participation of insurers" in large-scale settlements such as that orchestrated in Manville "is *critical* because the insurers provide substantial sources of funding." Priest Decl. ¶ 58 (emphasis added).

66. The testimony presented at the hearing by David Austern, who, as noted previously, has been the Manville Trust's General Counsel for the past 17 years, confirms that Manville Trust claimants have already been compensated for insurer claims under the existing Manville Trust procedures. This testimony was not challenged. Specifically, Mr. Austern testified that:

> The court-approved Trust Distribution Procedures were designed to compensate fully Trust claimants for *all liabilities* channeled to the Trust, whether the liability arises from actions by Johns-Manville Corporation *or the Settling Insurance Companies[] liability to Manville related to or arising out of the insurance policies issued to Manville*.The Trust settlement values *already compensate* claimants for any liabilities channeled to the Trust, including any channeled insurer liabilities.

Id. ¶ 18 (emphasis added).

67. Consistent with this intent, Trust Claimants are required to execute broad releases. The Trust has used three different forms of release in the nearly 16 years it has been operational. Each form of release that Trust claimants sign upon settling their Trust claims resolve claims against Settling Insurance Companies, including Travelers. The release defines Released Parties as including "the Trust, Manville Corporation and all subsidiaries, all Settling Insurance Companies. . . ." *Id.*Tab 2 (Exs.15-17).

68. The releases are broadly drafted to release the Released Parties—including the Settling Insurance Companies—from all further liability. They state:

> I further agree *that this Release extends to all my rights and claims of any kind against the Released Parties [including the Settling Insurers], whether based in tort, contract, fraud or any other legal or equitable theory*, and whether I possess them now or may possess them in the future. * * * I fully release, waive and discharge all rights or claims of any kind against the Released Parties allegedly resulting from my exposure to asbestos and/or asbestos containing products that were manufactured, distributed or sold by the Released Parties, including claims I now possess or may later possess because of any matter or thing done, omit-

> ted or suffered to be done by the Released Parties prior to and including today. . . .

Id. at 2 (emphasis added).[5]

69. Dr. Dunbar testified that the vast majority of plaintiffs in the pending actions—"between 95.8 percent and 96.9 percent"—can be expected to have already filed a claim against the Manville Trust, Dunbar Decl. ¶ 20, and thus would have executed this broad release.

III. THE DIRECT ACTION LAWSUITS

70. Notwithstanding the Court's Confirmation Order, the Insurance Settlement Order incorporated therein and the voluntary releases executed by over 660,000 claimants described above, plaintiffs' attorneys have filed complaints against Travelers in several states under a variety of legal theories (the "Direct Action Lawsuits").

71. While the Direct Action Lawsuits advance what purport to be different theories of liability—some rely on statutes regarding insurance settlement practices, others on common law notions of civil conspiracy and negligent undertaking—Professor Priest testified that they constitute one concerted front in a larger campaign by the asbestos plaintiffs' bar to " 'drag in more defendants, perhaps giving this litigation new life' when 'many of the traditional asbestos players are out of the game due to bankruptcy.' "

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[5] The prior releases used by the Trust contain similar language of similar breadth. All of the releases used by the Trust have specifically included the Settling Insurance Companies as Released Parties.

Priest Decl. ¶ 50 (quoting W. Mark Lanier, *Conspiracy Theory: Putting New Defendants In Manville's Chair*, Asbestos L. & Litig., ALI-ABA, Dec. 6-7, 2001 (Am.L.Inst.2001)).

72. Although the Confirmation Order, Insurance Settlement Order and Manville Trust releases make no distinction between lawsuits that seek to collect "any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be, asserted by any Person against [Travelers] based upon, arising out of or relating to" the insurance policies Travelers issued to Manville—all such suits are categorically barred—the complaints that gave rise to the Motion tend to fall within two broad categories: those purportedly based on statutory regulation of insurance practices (the "Statutory Direct Action Lawsuits") and those purportedly based on common law theories (the "Common Law Direct Action Lawsuits").

A. The Statutory Direct Action Lawsuits

73. The Statutory Direct Action Lawsuits purport to assert the rights of a class of individuals who are dissatisfied with the settlement they received when they or their attorneys negotiated with, *inter alia*, Travelers acting on behalf of Manville, or who declined to file personal injury suits against, *inter alia*, Manville because of Travelers prior use of the allegedly-false state of the art defense.

74. These plaintiffs claim that Travelers conspired to violate state laws prohibiting unfair insurance trade and settlement practices. For example, in the *Cashman* action, plaintiffs allege:

> Defendants conspired among and between themselves and the asbestos manufacturers and sellers to intentionally misrepresent and suppress relevant information regarding their insureds' knowledge of the hazards of asbestos and to minimize the full nature and extent of their insureds' products and the distribution of these products, in an effort to injure Plaintiffs and members of the proposed Class.

Ostrager Aff., Ex. O, *Cashman* Compl. ¶ 60; *see also* Munroe Decl. Tab P (Ex. 9) *Wise* Compl. ¶ 228; Munroe Decl., Tab P (Ex. 9) *Meninger* Compl. ¶ 55.

75. The *Cashman* plaintiffs, in the demand letter required under applicable Massachusetts law, elaborate:

> Under the contracts of insurance between insurers and manufacturers, insurers were bound to investigate and provide lawyers and financing to defend manufacturers and sellers in the asbestos litigation, and the insurers possessed the right to control the defense.

Frankel Aff., Ex. E, *Cashman* Letter pp. 28-29.

76. Plaintiffs contend that through early asbestosis claims from as far back as the 1950s, Travelers acquired knowledge about the dangers

of asbestos, recognized the potential for future escalation of asbestos litigation and began to influence Manville's purported failure to disclose knowledge about asbestos hazards. *Cashman* Letter pp. 15-18, 20-21, 22-27; *Wise* Compl. ¶¶ 115-*l*, 123, 127, 134-135.

77. The gravamen of the Statutory Direct Action Lawsuits centers on Travelers defense of Manville in asbestos-related claims, particularly during the period from the decision in the *Borel* case in 1973 and the filing of the Manville bankruptcy petition in 1982. These allegations, which run to dozens of pages in the more fully pled complaints and quote page after page of Travelers Manville-related documents in full text, form the heart of the complaints. *See, e.g., Cashman* Letter pp. 30-34, 40-46; *Wise* Compl. ¶¶ 156, 158-159, 163-164, 167, 174-175, 179-183, 185.

78. A consistent refrain throughout the complaints is the assertion that Travelers participated in the fraudulent perpetuation of the state of the art (or "no duty to warn") defense. Plaintiffs' allegations—and the documents quoted in the complaints—place Manville at the center of the development of this defense and the education of Travelers about the defense theory, and suggest that this happened in the course of Travelers' fulfillment of its duty to defend Manville under the Policies. *See, e.g., Cashman* Letter p. 40; *Wise* Compl. ¶ 179.

79. Plaintiffs further advance numerous allegations purporting to demonstrate that Travelers was responsible for coordination of the national

defense effort and development of the state of the art defense, *see Cashman* Letter pp. 29-30, 37, 40, 42-46; *Wise* Compl. ¶¶ 151, 173-175, 179-182, 194, 199, 201, 202, and rely upon acts or statements by Manville or its counsel in connection with defense of the underlying lawsuits to demonstrate the purported misconduct of Travelers. *See Cashman* Letter p. 40, 42-43; *Wise* Compl. ¶¶ 180, 183, 193, 195.

B. The Common Law Direct Action Lawsuits

80. The Common Law Direct Action Lawsuits are similar to the Statutory Direct Action Lawsuits, especially in their fixation on the relationship between Travelers and Manville.

81. Picking up on the Manville conspiracy theories that have driven plaintiffs' lawyers for years, the common law plaintiffs assert that Travelers and the other defendants (which include dozens—in certain cases, hundreds—of asbestos product manufacturers, distributors and premises owners) are liable under various common law theories. A common law direct action plaintiffs' attorney Bruce Carter's affidavit candidly admits, no court has ever accepted these theories. Carter Aff. ¶¶ 23 & 28. These plaintiffs, too, are dissatisfied with their inability to collect directly from Manville, and thus attempt to collect Manville's debts by "Putting New Defendants In Manville's Chair." Priest Decl. ¶¶ 49-50.

82. Specifically, they allege that Travelers violated certain alleged duties to them when it failed to disclose what it learned from Manville

in the course of its long tenure as Manville's primary general liability insurer. The *Gilchrist* plaintiffs allege, for example, that Travelers negligently performed inspections, conspired to deprive plaintiffs of information regarding the risks of asbestos exposure, and misrepresented and suppressed information regarding asbestos—all because it did not share its Manville-gained asbestos knowledge. *See* Priest Decl. Tab D (Ex. 218) *Gilchrist* Compl. ¶¶ 187-238.

83. Similarly, the consolidated *West Virginia Mass Litigation* Complaint ("*WVA* Complaint") is replete with claims of harm flowing from Travelers insurance relationship with Manville:

> Travelers facilitated the presentation of fraudulent "state of the art" defenses while understanding, via Manville, that asbestos was hazardous. Ostrager Aff. Ex. J; *WVA* Compl. ¶¶ 299, 301, 304.
>
> Travelers wrote memoranda about the potential litigation crises that would arise from asbestos, again based on its insurance relationship with Manville. *See, e.g.*, *WVA* Compl. ¶¶ 279, 280, 287, 298, 299.
>
> Travelers learned about many asbestos claims in the 1950s, via Manville. *WVA* Compl. ¶¶ 276, 278, 279, 281, 284.
>
> "Johns-Manville and Travelers" set forth "sworn answers containing factual errors" in response to interrogatories. *WVA* Compl. ¶ 278.

> Travelers failed to disclose what it learned from defending Manville to the named plaintiffs and the class they purport to represent. *WVA* Compl. ¶¶ 303, 304, 319, 321.

84. The *Sorrels* Complaint, filed in Louisiana, contains similar allegations:

> Travelers "conspired" with Manville "to injure Plaintiff and others similarly situated." Ostrager Aff., Ex. M. *Sorrels* Compl. ¶¶ 46, 47.
>
> Manville, acting as agent for Travelers, misrepresented information concerning, among other things, "animal studies concerning the relationship between asbestos exposure and cancer." *Sorrels* Compl. ¶ 49(BB); *see generally id.* ¶¶ 49(A)-(GG).

85. The *Boudreaux* Complaint filed in Texas follows the same pattern:

> Travelers acted in concert with "the Johns-Manville Corp." to "deceive and misinform decedents." Ostrager Aff., Ex. N *Boudreaux* Compl. ¶ 76; *see generally id.* ¶¶ 69-95.
>
> Travelers "undertook to perform a duty owed by their insureds to the Plaintiffs and decedents . . ." *Boudreaux* Compl. ¶ 98; *see generally id.* ¶¶ 96-103.

86. The *Serra* Complaint, filed in Massachusetts, alleged:

> Travelers and Manville conspired to "withhold, alter, suppress and misrepresent

information about the effects of asbestos exposure." *Serra* Compl. ¶ 33; *see generally id.* ¶¶ 33-37.

". . . Travelers Companies, Manville, Raymark and/or their predecessors in interest knowingly agreed . . . and conspired among themselves to cause plaintiff injuries . . . by exposing plaintiff to harmful and dangerous asbestos containing products . . ." *Serra* Compl. ¶ 34.

Because of its relationship with Manville, Travelers owed a duty to plaintiff to "warn the plaintiff of the dangers to which he was exposed when they knew of the dangers." *Serra* Compl. ¶ 35(b)(iv).

Travelers undertook duties owed by Manville to plaintiff "by testing of asbestos workers and the conduct of scientific studies." *Serra* Compl. ¶ 38; *see generally id.* 38-43.

87. The *Adkins* plaintiffs elaborate:

[T]he defendant insurance companies sold policies of insurance to employers, manufacturers and distributors and installers of asbestos containing products. *As part of this process, the defendants analyzed the risk associated with the use of asbestos containing products,* the occurrence of disease in workers using such products, the claims made against employers and others, and *methods of defending claims* arising from exposure to asbestos.

Adkins Compl. ¶ 86 (emphasis added).

88. The alleged factual predicate of the common law claims is essentially identical to the statutory actions: Travelers acquired knowledge about the dangers of asbestos from claims in the 1950s, recognized the potential for future escalation of asbestos litigation and began to influence Manville's purported failure to disclose knowledge about asbestos hazards, *e.g.*, *Darden* Compl. ¶¶ 49-51, 72; *WVA* Compl. ¶¶ 272, 278-80, 287, 296, 299; Travelers defended Manville, *e.g.*, *WVA* Compl. ¶¶ 303-305, 307, 315-16; Travelers advanced the state of the art defense, *e.g.*, *Darden* Compl. ¶ 104; *Gilchrist* Compl. ¶ 164; *Searls* Compl. ¶¶ 8-9; *WVA* Compl. ¶¶ 299, 301, 304; and Travelers coordinated Manville's national defense effort, *e.g.*, *Darden* Compl. ¶ ¶ 77, 98-100, 104-107, 122, 126; *Gilchrist* Compl. ¶¶ 164-65, 179, 181-82, 185-86; *Searls* Compl. ¶¶ 4, 5, 7; *WVA* Compl. ¶¶ 302, 310-12.

89. After the Court preliminarily enjoined prosecution of Direct Action Claims against Travelers pending final ruling on the merits, certain plaintiffs' lawyers violated the letter and the spirit of this Court's rulings by simply deleting the term "Manville" from their complaints—but leaving the substance unchanged.

90. In the *Wise* complaint, for example, plaintiffs had alleged:

> By at least June, 1969, Travelers began instructing its field people to mail liability files of asbestosis and Worker's Compensation files involving subrogation. By doing so, Travelers would get *"control over litigation"* involving the above insured [Johns-Manville

> Products Corporation] or any other insured who might be exposed to claim or suit through manufacturing or selling of products containing asbestosis.

Munroe Tab P, Ex. 9 *Wise* Compl. ¶ 139 (emphasis added). The *Darden* Complaint, however-which was filed after this Court's initial TRO—conveniently omits the term "Manville":

> "By at least June, 1969, Travelers began instructing its field people to mail liability files of asbestosis and Worker's Compensation files involving subrogation. By doing so, Travelers would get "control over litigation involving the above insured or any other insured who might be exposed to claim or suit through manufacturing or selling of products containing asbestosis."

Darden Compl. ¶ 68.

91. Similarly, while the plaintiffs in *Wise* made the following allegation:

> Throughout the 1970s and 1980s, *Manville and Travelers continued to work closely in their common interest* of defending and defeating the growing asbestos litigation and continued their ingenious promotion of the "no knowledge and no duty to warn" and "state of the art" defenses.

Wise Compl. ¶ 179 (emphasis added). *Darden*, however, merely omits the term "Manville":

> Throughout the 1970s and 1980s, *Travelers continued to work toward the interest* of defending and defeating the growing asbestos

> litigation and continued their ingenious promotion of the "no knowledge and no duty to warn" and "state of the art" defenses.

Darden Compl. ¶ 104 (emphasis added).

92. Similar deletions of "Manville" can be found throughout the common law complaints. *Compare, e.g., Wise* ¶ 195 with *Darden* ¶ 119; *Wise* ¶ 198 with *Darden* ¶ 121; *Wise* ¶ 199 with *Darden* ¶ 122. *See also* Transcript of Aug. 1, 2002 Hearing at 60-61 ("[The Court:] As I indicated, I can rule on [the Motion] today. But the possibility that all that is going to happen is a reworking and exorcising and massaging of the complaints ultimately to keep the parties at each other, I think it may help to gain some finality here.").

IV. THE DIRECT ACTION SETTLEMENT AGREEMENTS

93. Travelers has contended throughout this proceeding that the Direct Action Claims are barred by the Court's prior orders, including the Confirmation Order and the Insurance Settlement Order. Nonetheless, under the auspices of the Mediator, Travelers reached a series of landmark settlement agreements that will provide nearly a half billion dollars in additional compensation for asbestos victims.

94. While there is no distinction in the Confirmation Order, the Insurance Settlement Order and the Releases signed by Manville claimants between the Statutory Direct Action Lawsuits and the Common Law Direct Action Lawsuits, or between claims arising under the laws of Hawaii

and those arising under the laws of other states, the settlement negotiations progressed such that three separate settlement agreements were reached.

95. The Mediator has reported that each such settlement was "the product of good faith, arms-length negotiations" among the parties, and the Court agrees. Mediator's Final Report ¶ 4.

A. The Statutory Direct Action Settlement Agreement

96. In November 2003, Travelers reached an agreement with the statutory settlement counsel (on behalf of their clients) pursuant to which Travelers will pay up to $360 million to a settlement fund which will be used to compensate plaintiffs with statutory-based claims similar to those asserted in the *Wise* and *Cashman* cases under the laws of Florida, Hawaii, Kentucky, Louisiana, Massachusetts, Montana, New Mexico, North Carolina, North Dakota, South Carolina or West Virginia (the "Statutory Direct Action Settlement Agreement").

97. According to Travelers and the Statutory Direct Action Settlement Counsel, the selection of the eleven states is related to the risk that third-party claimants in those states may assert a cause of action directly against insurers and the number of potential claimants in those states.

98. The Statutory Direct Action Settlement Agreement provides for the creation of a fund to compensate plaintiffs in accordance with the Set-

tlement Fund Distribution Procedures as established in Exhibit C to the Settlement Agreement.

99. Among other terms and conditions of the Settlement Agreement, the agreement requires plaintiffs who participate in the settlement fund to provide releases to Travelers, which would release Travelers from further liability separate and apart from the statutory direct actions or from the protection provided under this Court's injunctions.

100. A condition of the Statutory Direct Action Settlement Agreement is that this Court issue a ruling clarifying the applicability of the injunctions contained in the Confirmation Order to statutory direct action claims that have or may be brought under the statutes, laws or regulations of the eleven states at issue.

B. The Common Law Direct Action Settlement Agreement

101. In May 2004, Travelers reached an agreement with the common law settlement counsel (on behalf of their clients) pursuant to which Travelers will pay up to $70 million to a settlement fund which will be used to compensate plaintiffs with claims such as those advanced in *Gilchrist* (the "Common Law Direct Action Settlement Agreement").

102. The Common Law Direct Action Settlement Agreement provides for the creation of a substantial fund to compensate plaintiffs in accordance with settlement fund distribution pro-

cedures that will be created in connection with the Settlement Agreement.

103. Among other terms and conditions of the Common Law Direct Action Settlement Agreement, the agreement requires plaintiffs who participate in the settlement fund to provide releases to Travelers, which would release Travelers from further liability separate and apart from the common law direct actions or from the protection provided under this Court's injunctions.

104. A condition of the Common Law Direct Action Settlement Agreement is that this Court issue a ruling clarifying the applicability of the injunctions contained in the Confirmation Order to common law direct action claims that have been brought or may be brought in the future.

C. The Hawaii Direct Action Settlement Agreement

105. In May 2004, Travelers reached an agreement with the Hawaii settlement counsel (on behalf of their clients) pursuant to which Travelers will pay up to $15 million to a settlement fund which will be used to compensate plaintiffs with claims that meet the eligibility criteria set forth in the Fund Distribution Procedures.

V. THE PARTIES' NOTICE PROGRAM

A. Notice Of The Statutory Direct Action Settlement Agreement

106. On March 30, 2004, the Court entered an Amended Scheduling Order approving a process of notifying all parties potentially affected by the Statutory Direct Action Settlement Agreement.

107. Pursuant to the Court's order, the CRMC and Connecticut Valley Claim Service Company ("CVCSC") compiled a list of all potentially affected claimants and their counsel. Austem Decl. [Ex. 27] ¶ 20. This "comprehensive list of all Manville claimants" was developed by combining CRMC's database of claimants with a listing of claimants who had filed against Combustion Engineering and/or H.K. Porter with the CVCSC. *Id.* 18, 20. The combined data identified a total of 159, 114 affected claimants. *Id.* 20.

108. CRMC provided Poorman-Douglas Corporation ("PDC") with this list of the affected claiments, separating those not represented by counsel from those represented by counsel (with the latter group accompanied by the name and address of their attorneys). *Id.* ¶ 21. On March 29, 2004, PDC sent the *pro se* affected claimants a Court-approved cover letter providing detailed instructions and a notice package. Prutsman Decl. ¶ 10.

109. On the same day, the 601 law firms representing the remaining affected claimants were sent a Court-approved letter providing detailed instructions, a notice package, and a certification

form requesting that the law firms confirm their representation of the claimants. *Id.* ¶ 9. CRMC received executed certification forms from firms representing 154,377 of the 159,114 affected claimants (approximately 97%). Austem Decl. [Ex.27] ¶¶ 23-24.

110. On April 9, 2004, CRMC provided PDC with a list of all affected claimants whom counsel (1) certified they no longer represented or (2) did not return an executed certification. Prutsman Decl. ¶ 11. These claimants were sent notice of the Statutory Direct Action Settlement via U.S. Mail. *Id.* PDC was unable to locate valid addresses for 893 of these uncertified claimants, and a records check reveals that 257 of them were deceased. *Id.* ¶ 12.

111. Additionally, the parties placed notices of these proceedings in newspapers nationwide. A Statutory Direct Action Settlement notice appeared in 331 newspapers across the United States, primarily focused in the eleven affected states. Finegan Decl. ¶ 23. The daily circulation in the eleven affected states was 8,867,841, with a readership of 20,192,073. *Id.* ¶ 24. The Sunday circulation was 10,015,697, with a readership of 24,408,253. *Id.*

112. In the 39 remaining states and the District of Columbia, notice was published in the top two general circulation newspapers. *Id.* ¶ 25. Notices were also published in an additional twenty-six newspapers specially selected to enhance the reach to *pro se* affected claimants. *Id.* Notices were published in a total of 106 newspapers in the non-affected states and the District

of Columbia. *Id.* The daily circulation was 19,456,628, with a readership of 44,302,741. *Id.* The Sunday circulation was 25,624,209, with a readership of 62,446,197. *Id.*

113. The notice campaign was demographically tailored to reach those most likely to be affected. The Simmons Research Bureau ("SMRB") calculated that the combined daily and Sunday newspaper notices reached approximately 79.06% of men 55 years of age and older, and 73.11% of men 35 years of age and older in the newspaper markets. ¶ 25. The combination of daily newspaper notices reached an estimated 70.20% of men 55 years of age and older, and 63.63% of men 35 years of age and older. *Id.*

114. Wachovia was retained to establish a toll-free telephone number to receive calls relating to the Statutory Direct Action Settlement notice program, and when requested, forward the caller written information. Laskiewicz Decl. ¶ 4. From March 31, 2004 to April 9, 2004, the call center was operational from 9 a.m. EST until 9 p.m. EST, seven days a week. *Id.* ¶ 7. On April 9, 2004, operational hours were reduced to 9 a.m. EST until 5 p.m. EST. *Id.* From March 31, 2004 to June 29, 2004, the call center received a total of 1,133 calls, 650 requests for information packets, and sent 650 information packets to interested callers. *Id.* ¶ 9.

115. Additionally, Statutory Direct Action Settlement Counsel created and maintained a web site (www.DirectActionSettlement.com) to provide additional notice to potentially affected claimants via the internet. Visitors to the web-

site were able to view information about the settlement and download the Settlement Agreement, Scheduling Order, and the pleadings at issue in this action.

B. Notice Of The Common Law Direct Action Settlement

116. On June 9, 2004, the Court entered a Second Amended Scheduling Order approving a process of notifying all parties potentially affected by the Common Law Direct Action Settlement Agreement.

117. Pursuant to this order, CRMC provided PDC with a complete list of all claimants who had filed against the Manville Trust. Prutsman Decl. ¶ 16. PDC created two mailing lists: one listing all claimants and the other listing all counsel whose claimants had filed claims with the Manville Trust. *Id.* On or before June 7, 2004, PDC sent a notice to each of the 4,197 law firms and to each of the 663,694 affected claimants who had filed against the Manville Trust. *Id.* ¶ 17. After the initial mailing, PDC mailed additional notices to 337 law firms and 11,347 claimants after receiving information regarding changes of address and law firm affiliations. *Id.*

118. A Common Law Direct Action Settlement notice was placed in 531 newspapers across the United States, including national publications and the top ten newspapers in all fifty states by metropolitan area and circulation. Finegan Decl. ¶ 31. The notice appeared multiple times in most

newspapers, and was published a total of 1,059 times. *Id.* ¶ 32.The daily circulation of the notice was 45,274,973, with a readership of 102,556,906. *Id.* The Sunday circulation of the notice was 49,420,149, with a readership of 120,436,903, reaching almost forty-seven percent of all United States households. *Id.*

119. SMRB calculated that combined, the daily and Sunday newspaper advertisements reached about 79.06% of men 55 years of age and older, and 73.11% of men 35 years of age and older in the newspaper markets. *Id.* ¶ 33. The combination of daily newspaper advertisements reached an estimated 70.20% of men 55 years of age and older, and 63.63% of men 35 years of age and older. *Id.*

120. Wachovia was retained to establish a toll-free telephone number to receive calls relating to the Common Law Direct Action Settlement notice program, and when requested, forward to the caller written information. Laskiewicz Decl. ¶ 10. From June 6, 2004, the call center was operational from 9 a.m. EST until 9 p.m. EST, seven days a week. *Id.* ¶ 13. From June 6, 2004 to June 29, 2004, the call center received a total of 26,274 calls, 19,751 requests for information packets, and sent 18,124 information packets to the interested callers, with 1,627 packets remaining to be sent to the callers who most recently requested information. *Id.* ¶ 15.

121. Wachovia also established an Internet web site (www.jminsurersettlement.com), which posted information pertaining to the settlement and hearing, including the Court-approved notices,

selected pleadings, the Court's prior scheduling orders and the settlement agreement itself. *Id.* ¶ 16. Through June 29, 2004, the web site was visited over 8,000 times, and nearly 4,000 registered users had downloaded documents. *Id.* ¶ 17.

C. Notice Of The Hawaii Direct Action Settlement Agreement

122. On June 3, 2004, the Court entered a Second Amended Scheduling Order approving a process of notifying all parties potentially affected by the Hawaii Direct Action Settlement Agreement.

123. Pursuant to this Order, CVCSC compiled a list of all Hawaii Direct Action Claimants potentially affected by the settlement. Prutsman Decl. ¶ 18. PDC assisted in the certification and direct mailing to the Hawaii Direct Action Claimants. *Id.* Two law firms certified they represented the "vast majority" of claimants, excluding eleven *pro se* claimants and thirty-one claimants that were no longer represented by either firm. *Id.* Notices were sent directly to the eleven *pro se* and thirty-one non-represented Hawaii Direct Action Claimants. *Id.* ¶ 19.

124. The notice of the Hawaii Direct Action Settlement Agreement was also published twice in six newspapers in Hawaii, for a total of twelve advertisements. Finegan Decl. ¶ 39. The daily circulation of the newspapers was 265,751, with a readership of 605,115. *Id.* The Sunday circulation of the newspapers was 303,221, with a readership of 738,949. *Id.*

125. In addition, a toll-free call center and Internet site (www.gogaliher.com) supplemented the notice. *Id.* ¶ 35.

CONCLUSIONS OF LAW

I. THIS COURT HAS THE CONSTITUTIONAL POWER AND STATUTORY AUTHORITY TO ENFORCE THE MANVILLE CONFIRMATION ORDER AND PLAN

1. The scope of the bankruptcy clause, contained in article I, section 8 of the Constitution, is well-established. U.S. const. art. I, § 8. It overrides any state law that "frustrates the full effectiveness of federal law. . . ." *Perez v. Campbell,* 402 U.S. 637, 652, 91 S.Ct. 1704, 29 L.Ed.2d 233 (1971) (declaring ineffective as against a discharged debtor the provisions of state law that prohibited issuance of drivers license to one who had an unpaid automobile accident liability, as the state law frustrated a "fresh start"). Even earlier than *Perez,* the Supreme Court had ruled that private rights arising under state law were subject to the federal bankruptcy law. *Hanover Nat'l Bank v. Moyses,* 186 U.S. 181, 188, 22 S.Ct. 857, 46 L.Ed. 1113 (1902) (right to enforce judgment on a note subject to discharge in bankruptcy).

2. Congress expressly provided this authority in numerous provisions of the Bankruptcy Code:

> Section 105(a) gives the bankruptcy courts broad powers to "issue any order, process or

judgment that is necessary or appropriate to carry out the provisions of" Chapter 11. 11 U.S.C. § 105(a).

Section 1141(a) provides that "the provisions of a confirmed plan bind . . . any creditor. . . ."11 U.S.C. § 1141(a).

Section 1142(b) states that "[t]he court may direct the debtor *and any other necessary party* to execute or deliver or to join in the execution or delivery of any instrument required to effect a transfer of property dealt with by a confirmed plan, and to perform any other act, including the satisfaction of any lien, *that is necessary for the consummation of the plan.*" 11 U.S.C. § 1142(b) (emphasis added).

3. It is well-settled that Section 1142(b), in particular, vests the Court with authority to oversee implementation of the plan and retain jurisdiction for acts necessary for the consummation of the plan. *In re Chateaugey Corp.*, 201 B.R. 48, 66 (Bankr.S.D.N.Y.1996), *aff'd in part*, 213 B.R. 633 (S.D.N.Y.1997) ("The clear intent of Section 1142(b) of the Bankruptcy Code is to assure that the terms and provisions of a confirmed chapter 11 plan are carried out until the plan is completed and the final decree is entered closing the case."); *In re Terracor*, 86 B.R. 671, 676 (D.Utah 1988) (same); *In re Sugarhouse Realty, Inc.*, 192 B.R. 355, 368 (E.D.Pa.1996) ("Section 1142 of the Bankruptcy Code grants the court broad jurisdiction to secure implementation of the plan and to enter orders to effectuate the

plan.") (affirming bankruptcy court order granting party-in-interest's motion to compel purchaser to close under agreement of sale where Confirmation Order contained specific language directing parties to consummate transaction); *see also In re NTG Indus., Inc.*, 118 B.R. 606, 611 (Bankr.N.D.Ill.1990) ("[S]ection 1142(b) provides the authority for the Court to direct any necessary party to perform any other act that is necessary for the consummation of the plan[.]").

4. Even more fundamentally, bankruptcy courts—as courts of record created by Congress --"have inherent or ancillary jurisdiction to interpret and enforce their own orders. . . ." *Chateaugay*, 201 B.R. at 62 (" 'Bankruptcy Courts must have the ability to enforce prior orders and 'secure or preserve the fruits and advantages of a judgment or decree rendered therein'. . . The proceeding being ancillary and dependent, the jurisdiction of the Court follows that of the original cause . . .' "); *see also U.S. v. Local 39, United Seafood Workers*, 55 F.3d 64, 69 (2d Cir.1995) ("an order of the court . . . *by its very nature* [ ] vests the court with equitable discretion to enforce the obligations imposed on the parties.") (emphasis added).

5. Consistent with the constitutional power and the statutory authority of this Court, this Court specifically retained jurisdiction to resolve disputes such as these. Paragraph 10.1 of the Plan provides for the retention of jurisdiction by this Court, *inter alia*, "[t]o determine any and all disputes arising under . . . the Settlement Agreements . . . ; [t]o enforce all orders, judgments,

injunctions and rulings entered in connection with the Cases; and [t]o enter such orders as may be necessary or appropriate in aid of confirmation and to facilitate implementation of the Plan." Ostrager Aff., Ex. H at ¶ 10.1(B), (K)(L). The Confirmation Order provides that the Court retains jurisdiction, *inter alia*, "to determine any and all disputes arising under the Plan . . . and the Settlement Agreements; . . . [t]o enforce all orders, judgments, injunctions and rulings entered in connection with the Cases; and [e]nter such orders as may be necessary or appropriate in aid of confirmation and to facilitate implementation of the Plan." Ostrager Aff., Ex. F at Decretal ¶ 28(a), (j), (k).

6. This Court has, as it has previously held, jurisdiction to enforce the Manville Confirmation Order and Plan pursuant to the jurisdiction retention provisions contained therein, the authority conferred by Sections 105(a), 1141(a) and 1142(b) of the Bankruptcy Code, and the Court's inherent power to interpret and enforce its own orders. *In re Johns-Manville Corp.*, 97 B.R. 174, 181 (Bankr.S.D.N.Y.1989) (Court "has continuing jurisdiction to enjoin non-bankruptcy suits that impair or violate the provisions of the Plan"). As Judge Lynch recently held in an appeal from these very proceedings, the claim that this Court lacks jurisdiction to remedy violations of its prior orders is "completely without merit." *In re Johns-Manville Corp.*, No. 03 Civ. 7173, 2004 WL 385118, at *2 (S.D.N.Y. Mar.2, 2004) (dismissing appeal from this Court's TRO because, *inter alia*, "[appellant's] challenge to the

bankruptcy court's jurisdiction is completely without merit and does not present substantial ground for difference of opinion").

7. "[T]he bankruptcy court retains post-confirmation jurisdiction to interpret and enforce its own orders in aid of their proper execution." *In re Johns-Manville Corp.*, 97 B.R. at 180; *accord In re Continental Airlines, Inc.*, 236 B.R. 318, 325-26 (Bankr.D.Del.1999) (bankruptcy court has jurisdiction to enforce confirmation order and determine whether plan barred separate court action), *aff'd*, 2000 WL 1425751 (D.Del. Sept.12, 2000), *aff'd*, 279 F.3d 226 (3d Cir.2002); *In re Texaco Inc.*, 182 B.R. 937, 944 (Bankr.S.D.N.Y. 1995) ("[T]he express language of the Bankruptcy Code, the decided cases . . . , the express provisions of the Texaco Plan and sound considerations of public policy compel the conclusion that a bankruptcy court has subject matter jurisdiction to enforce and interpret its own orders.").

8. The objectors' repeated invocation of cases such as *In re Federal-Mogul Global, Inc.*, 300 F.3d 368, 379-384 (3d Cir.2002), *cert. denied sub nom. DaimlerChrysler Corp. v. Official Comm. of Asbestos Claimants*, 537 U.S. 1148, 123 S.Ct. 884, 154 L.Ed.2d 851 (2003), and *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 n. 6, 115 S.Ct. 1493, 131 L.Ed.2d 403 (1995), for the proposition that "bankruptcy courts have no jurisdiction over proceedings that have no effect on the debtor," *id.*, are beside the point and without merit. In this proceeding, the Court is enforcing its own Orders and thus its jurisdiction is derivative of the original jurisdiction. There is no question that this

Court had jurisdiction over the Confirmation Order. 28 U.S.C. §§ 1334(b); 157(b)(2)(L) ("Confirmation of Plans"). This Court's conclusion that claims "based upon, arising out of, or related to" the Travelers/Manville relationship would adversely affect the Manville estate during reorganization was unanimously and conclusively determined to be a sufficient nexus for the channeling injunction the Second Circuit:

> [A]uthority for the injunction is to be found in section 105(a) of the Bankruptcy Code, which permits the Bankruptcy Court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." This provision has been construed liberally to enjoin suits that might impede the reorganization process. *In this case, the Bankruptcy Court found as a fact that to permit actions against Manville's insurers arising from Manville's policies would adversely affect property of the estate and would interfere with reorganization.*

MacArthur Co. v. Johns-Manville Corp., 837 F.2d 89, 93-94 (2d Cir.1988) (citations omitted).

9. In short, the Second Circuit has already considered and rejected a claim that the provisions in the Confirmation Order and Insurance Settlement Order incorporated therein protecting Travelers from claims "based upon, arising out of, or related to" the policies exceeded this Court's jurisdiction. *Id.* at 93-94. It necessarily follows that the Court has the power to interpret and enforce compliance with those Orders. Such power is inherent in the nature of the original

injunctions—which, by their terms, remain effective in perpetuity—and the very nature of this Court.

II. ALL PARTIES HAVE BEEN GIVEN THE REQUISITE NOTICE AND OPPORTUNITY TO BE HEARD IN THESE PROCEEDINGS

A. Notice Of The Statutory Proceedings Was Sufficient

10. As demonstrated by Findings of Fact ¶¶ 106 to 115 *supra*, the Statutory Direct Action Settlement notice program was reasonably calculated under all the circumstances to apprise the affected individuals of the proceedings and actions taken involving their interests, *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950), such program did in fact apprise the overwhelming majority of potentially affected claimants and far exceeded the minimum notice required. *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 490, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988) ("For creditors who are not 'reasonably ascertainable,' publication notice can suffice. Nor is everyone who may conceivably have a claim properly considered a creditor entitled to actual notice. Here, as in *Mullane*, it is reasonable to dispense with actual notice to those with mere 'conjectural' claims.").

B. Notice Of The Common Law Proceedings Was Sufficient

11. As demonstrated by Findings of Fact ¶¶ 116 to 121 *supra*, the Common Law Direct Action Settlement notice program was also sufficient. The Court concludes that mailing direct notice via U.S. Mail to 4,197 law firms and 663,694 potentially affected claimants, as well as undertaking an extensive print media and internet campaign reaching nearly 50% of U.S. households, met and exceeded the requirements of due process.

12. The Court's conclusion in this regard is buttressed by the results of the notice campaign, including over 26,000 calls fielded by the toll-free number identified in the mailings and newspaper advertisements; nearly 20,000 requests for information packets; 8,000 website visits and almost 4,000 users registered to download documents. These results simply speak for themselves.

C. Notice of The Hawaii Proceedings Was Sufficient

13. As with the statutory notice program, the fact that all but 42 potentially affected claimants received notice directly by their counsel (and those 42 individuals were mailed packets) compels the conclusion that the requirements of due process have been met and exceeded. This conclusion is only amplified by the additional efforts undertaken: extensive newspaper campaign, toll-free call center and internet site.

D. Use Of A Bifurcated Settlement Approval Process Did Not Deprive Any Person Of Proper Notice And Is Fully Consistent With Second Circuit Law

14. Because the eligibility criteria and fund distribution procedures have not yet been established for the Common Law Direct Action Settlement, certain objectors contend they are deprived of appropriate notice of these proceedings. The Court concludes that these objections have no support in applicable Second Circuit law because formation of a distribution plan is not a prerequisite to approval of a settlement as a whole. *In re "Agent Orange" Prod. Liab. Litig. MDL No. 381*, 818 F.2d 145, 170 (2d Cir.1987) ("[Developing distribution procedures] is a difficult, time-consuming process. To impose an absolute requirement that a hearing on the fairness of a settlement follow adoption of a distribution plan would immensely complicate settlement negotiations and might so overburden the parties and the district court as to prevent either task from being accomplished."); *Nellis v. Shugrue*, 165 B.R. 115, 126 (S.D.N.Y.1994) ("Approval of a settlement can predate the determination of individual awards under the distribution plan."); *see also Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1153 (8th Cir.1999) (settlement notice need not contain formula for calculating individual awards; mailed notice was adequate where it "provided a reasonable summary of the stakes of the litigation, and class members could easily acquire more detailed information, including data on potential individual awards, through the

telephone number that was provided"); *In re Holocaust Victim Assets Litig.*, 105 F.Supp.2d 139, 149-51 (E.D.N.Y.2000), *subsequent proceeding at* 2000 WL 33241660 (E.D.N.Y. Nov.22, 2000), *aff'd*, 14 Fed. Appx. 132 (2d Cir.2001); *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 480 (S.D.N.Y.1998), *subsequent proceeding at* 2000 WL 37992 (S.D.N.Y. Jan.18, 2000); *In re Drexel Burnham Lambert Group, Inc.*, 130 B.R. 910, 922 (S.D.N.Y.1991), *aff'd*, 960 F.2d 285 (2d Cir.1992).

15. The Court heard testimony from Don Ward at the July 6 hearing and, after cross-examination, tentatively approved the motion to appoint Mr. Ward as the common law claims administrator. Fund Distribution Procedures will be developed with the assistance of the claims administrator with input from all interested parties, and will be submitted to the Court for final approval.

16. Thus, inasmuch as the Common Law Settlement Agreement appropriately provides for "ultimate resolution of the distribution scheme by an outside neutral party," *Nellis*, 165 B.R. at 126, and because the Second Circuit has specifically sanctioned the use of a bifurcated process in which a settlement as a whole is evaluated prior to the adoption and evaluation of distribution procedures, and because the Common Law Direct Action Settlement Agreement contemplates this Court's approval of the final distribution scheme on notice to all parties, the Court concludes that the objections to this bifurcated process are not well-taken.

III. THE DIRECT ACTION CLAIMS VIOLATE THE CONFIRMATION ORDER AND THE INSURANCE SETTLEMENT ORDER CONTAINED THEREIN

A. There Is No Evidence That The Direct Action Claims Do Not Relate To Manville

17. When Travelers first sought this Court's protection in the summer of 2002, the plaintiffs in both the Statutory and Common Law Direct Action Lawsuits denied that their claims fell within the scope of this Court's orders. Two years, countless submissions and a full evidentiary hearing later, these objections have withered away and the evidence on the record and before this Court conclusively establishes that the direct action claims against Travelers are inextricably intertwined with Travelers long relationship as Manville's insurer.

18. On this record, no evidence has been presented—much less credibly proved—that the Direct Action Claims do not relate to Manville.

B. The Meaning And Scope Of The Court's Orders

19. In the final analysis, the relevant inquiry —in the 1980s, in 2002 and today—is the scope of the relief this Court intended to provide to Travelers when it entered the Confirmation Order and the Insurance Settlement Order incorporated therein.[6] The Direct Action Claims, though not

[6] Any purported arguments based on statements of the parties during the settlement drafting process or otherwise

totally unheard of in the mid-1980s, were certainly not as prevalent as they are today. This Court did not intend the scope of finality of the Orders to be less than 100% of everything Manville-related. As set forth below, this Court clarifies that the Direct Action Claims that are the subject of these proceedings are within the scope of the Confirmation Order's and the Insurance Settlement Order's prohibitions, and are—and always have been—permanently barred.

20. The Court has administered the Manville bankruptcy since it was filed on August 26, 1982, presided over confirmation of the Manville Plan, and issued the Confirmation Order. As set forth above, the key to confirmation of the Manville Plan was the creation of a mechanism through which asbestos victims could be compensated with funds contributed by Settling Insurers. The Court understood that insurers would not contribute funds without receiving assurance that any liabilities arising from or relating to their

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are thus completely beside the point. *See, e.g., Matter of Mem'l Hosp. of Iowa County, Inc.*, 862 F.2d 1299, 1300 (7th Cir.1988) (court rulings are "public act[s] of the government"—not "private agreement[s]" among parties); *U.S. v. Swift & Co.*, 286 U.S. 106, 115, 52 S.Ct. 460, 76 L.Ed. 999 (1932) ("We reject the argument for the interveners that a decree entered upon consent is to be treated as a contract and not as a judicial act."); *see also Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 380-81, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994); *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health and Human Res.*, 532 U.S. 598, 604-05, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001) ("court-ordered consent decrees create [a] material alteration of the legal relationship of the parties [with a] necessary judicial *imprimatur* on the change.").

insurance relationships with Manville would be fully and finally resolved. The Court also understood that in order to facilitate the insurance settlements, the Confirmation Order needed to contain a centralization of disputes provision to ensure that Settling Insurers would not be required to expend resources litigating the scope of the Court's Orders across the country.

C. The Relevant Orders

21. In order to ensure finality, the Confirmation Order permanently enjoins "all Persons" from commencing any action against any of the Settling Insurance Companies "for the purpose of, *directly or indirectly*, collecting, recovering or receiving payment of, on or with respect to any Claim . . . or Other Asbestos Obligation . . . [,]" Ostrager Aff., Ex. F at Decretal ¶ 29 (emphasis added).

22. Similarly, again in order to ensure finality, the Insurance Settlement Order specifically prohibits every claim at issue here with its clear command that "all Persons are permanently restrained and enjoined from commencing and/or continuing any suit, arbitration or other proceeding of any type or nature for Policy Claims against any or all members of the Settling Insurer Group. . . ." Ostrager Aff., Ex. D at 23.2(F); *accord id.* at 1.2(D), 2.2(D). As set out above, "Policy Claims" are defined as broadly as possible to include

> any and all claims, demands, allegations, duties, liabilities and obligations (whether or

> not presently known) which have been, or *could have been, or might be, asserted* by any Person against any or all members of the JM Group or against any or all members of *the Settling Insurer Group based upon, arising out of or relating to the Policies.*

Ostrager Aff., Ex. D at 23.1 (emphasis added).

23. The Court's repeated use of the terms "arising out of" and "related to" were not gratuitous or superfluous; they were meant to provide the broadest protection possible to facilitate global finality for Travelers as a necessary condition for it to make a significant contribution to the Manville estate. "In many areas of law . . . the use of 'arising out of' language in a contract is considered unambiguous and viewed as reasonably supporting only a broad reading."*Nycal Corp. v. Inoco PLC,* No. 98-7058, 1998 WL 870192, at *2 (2d Cir. Dec.9, 1998); *see also Richards v. Princeton Ins. Co.,* 178 F.Supp.2d 386, 392-93 (S.D.N.Y.2001) (in the context of insurance policies "[t]he term 'arising out of' is to be interpreted in a broad and comprehensive sense to mean originating from or growing out of . . ."); *U.S. Underwriters Ins. Co. v. Zeugma Corp.,* No. 97 Civ. 8031(SS), 1998 WL 633679, at *3 (S.D.N.Y. Sept.15, 1998) ("When used in a policy exclusion the words 'arising out of' are deemed to be 'broad, general, comprehensive terms ordinarily understood to mean originating from, incident to, or having connection with' ").

24. The phrase "related to" is even "*broader* in scope" than "arising out of," does not require a causal relation, has been found to be synonymous

with phrases such as "in connection with" "associated with" "with reference to" and "with respect to," and is not ambiguous in spite of its breadth. *Coregis Ins. Co. v. Am. Health Found., Inc.*, 241 F.3d 123, 128-29 (2d Cir.2001); *see also Mehler v. Terminix Int'l Co.*, 205 F.3d 44, 49 (2d Cir.2000) (finding arbitration clause containing "arising out of or relating to" language to be "classically broad" and "precisely the kind of broad arbitration clause that justifies a presumption of arbitrability"); *Vt. Pure Holdings, Ltd. v. Descartes Systs. Group, Inc.*, 140 F.Supp.2d 331, 334-35 (D.Vt.2001) ("The Second Circuit has . . . held that the ordinary meaning of the term 'related to' was clear, unambiguous, and quite broad . . . and has been defined simply as 'connected by reason of an established or discoverable relation' ").

D. The Direct Action Claims Violate The Insurance Settlement Order Incorporated In The Confirmation Order

25. The evidence in this proceeding establishes that the gravamen of Direct Action Claims were acts or omissions by Travelers arising from or relating to Travelers insurance relationship with Manville. Thus, claims against Travelers based on such actions or omissions necessarily "arise out of" and "related to" the Policies. As summarized by Professor Priest, the factual allegations against Travelers "inescapabl[y]" relate to its relationship with Manville. 7/6/04 Tr. at 33.

26. Under well-settled law, an insurer's participation in the investigation and defense of

claims against a policyholder is firmly rooted in the insurance policies, as the duty to defend and pay covered losses of a policyholder in litigation is a central element of liability insurance. *Cont'l Cas. Co. v. Rapid-Am. Corp.*, 80 N.Y.2d 640, 593 N.Y.S.2d 966, 609 N.E.2d 506, 509 (N.Y.1993) ("[t]hough policy coverage is often denominated as 'liability insurance,' where the insurer has made promises to defend 'it is clear that [the coverage] is, in fact, 'litigation insurance' as well") (citations omitted); *Truax v. State Farm Ins. Cos.*, 101 Misc.2d 1031, 422 N.Y.S.2d 592, 594 (N.Y.Sup.Ct.1979). Indeed, "the duty to defend is broader than the duty to indemnify." *Recant v. Harwood*, 222 A.D.2d 372, 635 N.Y.S.2d 231, 232 (N.Y.App. Div. 1st Dep't 1995) (citing *Goldberg v. Lumber Mut. Cas. Ins. Co.*, 297 N.Y. 148, 154, 77 N.E.2d 131 (1948)); *see also Int'l Paper Co. v. Cont'l Cas. Co.*, 35 N.Y.2d 322, 361 N.Y.S.2d 873, 320 N.E.2d 619, 621 (N.Y.1974) ("An insurer's obligation to furnish its insured with a defense is heavy indeed, and, of course, broader than its duty to pay.").

27. The obligation to defend arises out of the insurance policy, and its scope is determined based on the policy's provisions. *Fitzpatrick v. Am. Honda Motor Co., Inc.*, 78 N.Y.2d 61, 571 N.Y.S.2d 672, 575 N.E.2d 90, 93 (N.Y.1991) ("the duty to defend derives, in the first instance . . . from the insurer's own contract with the insured . . . the contract itself must always remain a primary point of reference"); *Int'l Paper Co.*, 361 N.Y.S.2d 873, 320 N.E.2d at 621 ("An insured's right to be accorded legal representation is a con-

tractual right and consideration upon which his premium is in part predicated, and this right exists even if debatable theories are alleged in the pleading against the insured.").

28. The duties Travelers owed to Manville are not in dispute:

> *Defense, Settlement, Supplementary Payments. As respects such insurance as is afforded by the other terms of this policy the company shall*
>
> (a) *defend* in his name and behalf any suit against the insured alleging such injury, sickness, disease or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the company shall have the right to make such *investigation,* negotiation and settlement of any claim or suit as may be deemed expedient by the company.

Munroe Decl. Tab A (Ex. 13 at 2, Insuring Agreements ¶ II) (emphasis added).

29. The duty to defend its insured under a policy (including investigations made by the insurer in connection therewith) consists of a duty to defend *in confidence,* subject to all of the protections of privilege and confidentiality that the adversarial system affords all parties in litigation. *Am. Special Risk Ins. Co. v. Greyhound Dial Corp.,* No. 90 Civ.2066(RPP), 1995 WL 442151, at *2 (S.D.N.Y. Jul.26, 1995) (holding communications between insurer and insured after a claim is filed are privileged); *Recant,* 635 N.Y.S.2d at 232-33 (finding accident reports prepared by

insured for insurer, as well as most liability insurer work product conducted after accident, to be privileged); *see also Harris v. Processed Wood, Inc.*, 455 N.Y.S.2d 220, 222 (N.Y.App. Div. 4th Dep't 1982) (holding statements by policyholder to insurer made in connection with the defense and settlement of claim are privileged); *Finegold v. Lewis*, 22 A.D.2d 447, 256 N.Y.S.2d 358 (N.Y.App. Div.2d Dep't 1965) (finding statements made by insured to liability insurer, "a defendant in a very real sense," is privileged as preparation for trial whether or not action has commenced). In accordance with these basic principles of insurance law, Travelers defended asbestos cases against Manville pursuant to the Policies and maintained privileged and confidential both Manville's disclosures and Travelers' own defense-related investigations.

E. The Direct Action Claims Also Violate The Other Provisions Confirmation Order

30. If the Direct Action Claimants had been compensated 100% by either Manville or the Manville Trust, they would have no economic basis to bring claims against Travelers for its Manville-related conduct: all such injuries would have been paid 100%.

31. It is only because they feel they should have been able to negotiate a larger settlement with Travelers acting on behalf of Manville, or that they should have received a larger award from the Manville Trust, that the Direct Action Claims are trying to recover more. But it was

precisely the possibility of less than 100% compensation from the Trust that led the Court to prohibit any direct or indirect efforts to make up that shortfall from the Settling Insurers on "any theory of law." Ostrager Aff., Ex. H at Ex. A to Plan.

32. The Direct Action Claims fall within the Confirmation Order's permanent injunction against all persons from commencing any action against any of the Settling Insurance Companies "for the purpose of, *directly or indirectly*, collecting, recovering or receiving payment of, on or with respect to any Claim . . . or Other Asbestos Obligation. . . ." Ostrager Aff., Ex. F at Decretal ¶ 29 (emphasis added).

F. Any Claims For "Contribution" Or "Indemnity" By Other Insurers Would Violate The Confirmation Order

33. A condition of each of the Settlement Agreements is that this Court issue a ruling clarifying that the injunctions contained in the Confirmation Order and the Insurance Settlement Order apply to contribution or indemnity claims against Travelers arising from any enjoined direct action claims. Several insurance companies named as defendants in certain of the Direct Action Claims argue that Court is unauthorized to bar the contribution or indemnity claims they may have against Travelers.

i. Contribution Or Indemnity Claims By Non-Settling Defendants In Direct Action Claims Would Violate The Confirmation Order And The Insurance Settlement Order Contained Therein

34. The Confirmation Order permanently enjoins all persons:

> from taking one or more of the following actions for the purpose of, directly or indirectly, collecting, recovering or receiving payment of, on or with respect to any Claim . . . or Other Asbestos Obligation . . . (a) [c]ommencing, conducting, or continuing in any manner, directly or indirectly, any suit, action or other proceeding . . . against or affecting . . . any of the Settling Insurance Companies. . . .

Ostrager Aff., Ex. F at Decretal ¶ 29. In addition, the Insurance Settlement Order specifically prohibits contribution and indemnity claims, providing that "all Persons are permanently restrained and enjoined from commencing and/or continuing any suit, arbitration or other proceeding *of any type or nature* for Policy Claims against any or all members of the Settling Insurer Group." Ostrager Aff., Ex. D at 23.2(F) (emphasis added); *accord id.* at 1.2(D), 2.2, 256 N.Y.S.2d 358(D). "Policy Claims" are defined broadly as "any and all claims . . . which have been, or could have been, or might be, asserted by any Person . . . against any or all members of the Settling Insurer Group

based upon, arising out of or relating to the Policies." *Id.* at ¶ 23.1.

35. The Court's Orders apply to "all Persons" without regard to whether the "Person" asserting the claim is an individual plaintiff attempting to hold Travelers liable for Manville-related conduct or another insurance company attempting to do the same under the guise of claims for "contribution" or "indemnity"—both of which qualify as "claims . . . which have been, or could have been, or might be, asserted by any Person . . . against any or all members of the Settling Insurer Group based upon, arising out of or relating to any or all of the Policies."Ostrager Aff., Ex. D at ¶ 23.1.

ii. The Judgment Reduction Provisions Fully Protect Non-Settling Insurer Defendants

36. Moreover, the Proposed Order contains a judgment reduction provision that enforces the Insurance Settlement Order and Confirmation Order by clarifying that Policy Claims arising from Travelers alleged conduct may not be surreptitiously collected by plaintiffs from other insurers. *Cf. In re Ivan F. Boesky Sec. Litig.*, 948 F.2d 1358, 1363 (2d Cir.1991) (noting that judgment reduction provisions effectuate the finality of settlements—such as the Travelers/Manville settlement—by making sure that settling defendants are not "derivatively exposed to claims by [ ] plaintiffs in the form of claims for indemnity or contribution by the nonsettling defendants

against whom the plaintiffs may obtain judgments.").

37. The judgment reduction provides:

> Any judgment obtained against a non-settling defendant shall be reduced by the amount, percentage or share attributable to the settling defendant whether by contribution, indemnity or otherwise under applicable state law. The non-settling defendant subject to a damages award shall establish any right or claim for indemnification or contribution and the amount, percentage or share attributable to the settling defendant in the case in which such award is made.

38. In addition to properly enforcing the Confirmation Order and the Insurance Settlement Order by prohibiting indirect collection of Policy Claims from third parties, the judgment reduction provision protects the interests of non-settling defendants in the direct action claims so completely as to render their objections to the settlements moot. *Ivan F. Boesky*, 948 F.2d at 1362-69 (recognizing enforceability of judgment reduction provisions); *Drexel Burnham Lambert Group*, 130 B.R. at 926 (same); *Eichenholtz v. Brennan*, 52 F.3d 478, 486-87 (3d Cir.1995) (same); *In re Munford, Inc.*, 97 F.3d 449 (11th Cir.1996) (same, in the bankruptcy context).

G. The "Notice Pleading" Suits And Future Actions Attempting To Hold Travelers Liable For The Sins Of Manville Are Properly Barred Under The Proposed Order

39. While many of the complaints placed in evidence before the Court are replete with detailed allegations regarding Travelers insurance relationship with Manville, others filed in so-called notice pleading jurisdictions provide little, if any, factual underpinning for their broad, conclusory claims against Travelers. It is reasonable to conclude that future plaintiffs will attempt to circumvent the Court's orders with similar notice pleading. *See infra* ¶¶ 89-92 (discussing the creative effort of some plaintiffs to avoid the Court's TRO by simply deleting the word "Manville").

40. As Professor Priest cogently noted, such attempts will likely be bound to run afoul of this Court's orders:

> Given the significance of Manville in the mining, manufacture and distribution of asbestos and asbestos-containing products, its dominant role in asbestos litigation, and Travelers unique role as Manville's primary insurer and obligations under the Manville policies, it is difficult to imagine how a plaintiff would attempt to hold Travelers liable for acts or omissions relating to the hazards of asbestos in these statutory direct action claims without relying on information Travelers obtained based on its obligations under the Manville policies.

Priest Decl. ¶ 46; *see also id.* ¶ 54 ("Likewise, in my opinion, any other claim against Travelers based on Travelers knowledge or alleged knowledge concerning the hazards of asbestos . . . would undoubtedly arise from or relate to Travelers insurance relationship with Manville and its obligations under Travelers policies."); 7/6/04 Tr. at 33 (the factual allegations against Travelers "inescapabl[y]" relate to its relationship with Manville) (testimony of Prof. Priest). This evidence is unrebutted.

41. Courts are not powerless to deal with those who would elevate form over substance. Indeed, courts have "broad discretionary power . . . to fashion equitable remedies which are a special blend of what is necessary, what is fair, and what is workable." *Class v. Norton,* 376 F.Supp. 496, 501 (D.Conn.), *aff'd in part, rev'd in part on other grounds,*505 F.2d 123 (2d Cir.1974) (quotations omitted). "Once a right and a violation have been shown, the scope of [the] court's equitable powers to remedy past wrongs is *broad,* for breadth and flexibility are inherent in equitable remedies." *Swann v. Charlotte-Mecklenburg Bd. of Educ.,* 402 U.S. 1, 15, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971) (emphasis added); *accord EEOC v. Local 580, Int'l Ass'n of Bridge, Structural & Ornamental Ironworkers,* 925 F.2d 588, 593 (2d Cir.1991) (for courts of equity, "judicial discretion in flexing its supervisory and enforcement muscles is broad.").

42. The evidence adduced in this proceeding shows that the Court's Orders have been repeatedly violated by creative plaintiffs. In view of

these violations, the Court has the power and inclination to enter the so-called "gatekeeping" provision that the parties have proposed, which reasonably and appropriately vests the initial determination regarding whether an asbestos suit against Travelers will violate the Court's orders. This provision is congruent, proportional and wholly justified. *Berger v. Heckler*, 771 F.2d 1556, 1558, 1569 (2d Cir.1985) (party's "demonstrated noncompliance with the terms of the [court's order]" warranted court's taking "such steps as are appropriate given the resistance of the noncompliant party") (citations omitted).

43. Moreover, the gatekeeping provision is fully justified by the Court's duty to look to the body of *facts* alleged—and not to the labels or legal theories—to ascertain whether a given claim has been settled, dismissed or enjoined, *Antonsen v. Ward*, 943 F.2d 198, 201 (2d Cir.1991); *Berlitz Sch. of Languages of Am., Inc. v. Everest House*, 619 F.2d 211, 215 (2d Cir.1980) ("whatever legal theory is advanced, when the factual predicate upon which claims are based are substantially identical, the claims are deemed to be duplicative for purposes of res judicata"); *Expert Elec., Inc. v. Levine*, 554 F.2d 1227, 1234 (2d Cir.1977) ("For it is the facts surrounding the transaction or occurrence which operate to constitute the cause of action, not the legal theory upon which a litigant relies.") (citation omitted), as well as the Court's duty to address the litigation realities that are now before it—especially in the context of the attempted resuscitation of settled, dismissed and enjoined causes of action. *Levin v. Interconti-*

nental Cas. Ins. Co., 95 N.Y.2d 523, 719 N.Y.S.2d 634, 742 N.E.2d 109, 111 (N.Y.2000) (court is "guided not by nomenclature but by the realities of litigation"); *Staatsburg Water Co. v. Staatsburg Fire Dist.*, 72 N.Y.2d 147, 531 N.Y.S.2d 876, 527 N.E.2d 754, 756 (N.Y.1988) (considering "realities of litigation" in deciding whether claims were enjoined); *see also In re Cohen*, 92 B.R. 54, 66 (Bankr.S.D.N.Y.1988) (same). It is the factual "gravamen" of the complaint, and not the various artistries and illusions of minimal notice pleading, which guide disposition here. *Monfort v. Larson*, 257 A.D.2d 261, 693 N.Y.S.2d 286, 289 (N.Y.App. Div.3d Dep't 1999) ("Regardless of the language used in the complaint, the gravamen of plaintiffs' tort causes of action [are preempted]."); *Lakonia Mgmt. Ltd. v. Meriwether*, 106 F.Supp.2d 540, 551 (S.D.N.Y.2000) (looking to the "gravamen of the complaint" to determine the nature of the action).

44. Consequently, the Court concludes that Travelers has clearly shown entitlement to both the gatekeeping provision in the Proposed Order and a clarification that the commencement or prosecution of all actions and proceedings against Travelers that directly or indirectly are based upon, arise out of or relate to Travelers insurance relationship with Manville or Travelers knowledge or alleged knowledge concerning the hazards of asbestos, including but not limited to, any and all claims or demands relating to asbestos that now or in the future allege unfair competition, unfair or deceptive claims handling or trade practices, bad faith, failure to warn,

breach of any duty to disclose information, negligent undertaking, negligent or intentional misrepresentation, negligent inspection or any theory or cause of action similar to the foregoing, under any statute or common law, and any claims for contribution or indemnity relating in any way to the foregoing, are permanently enjoined as against Travelers pursuant to the Confirmation Order.

IV. GRANTING THE RELIEF REQUESTED WILL NOT HARM THE MANVILLE TRUST

45. Approval of these Settlement Agreements will provide a significant new source of funds to asbestos claimants. Critically, the new funds are wholly accretive.

46. Under the express terms of the Insurance Settlement Order incorporated into the Confirmation Order, all claims that are enjoined and released are also channeled to the Trust. *See* Ostrager Aff., Ex. D at 1.2(B)(D), 2.2(B)(D), 23.2(D)(F).

47. Accordingly, the Court-approved Trust Distribution Procedures were and remain designed to fully compensate Trust claimants for all liabilities channeled to the Trust—whether such liability arises from actions by Manville or by the Settling Insurers.

48. Trust settlement values already compensate claimants for any and all liabilities channeled to the Trust.

49. To confirm this result and further guard against any hypothetical danger to the Trust, the Proposed Order clearly provides that it shall not increase the liabilities or obligations of the Manville Trust.

50. Such provision will be both descriptive and prescriptive: it accurately reflects the Court's intent and it affirmatively orders that no additional liabilities will be channeled to the Trust that have not already been released and channeled for nearly twenty years.

V. THE SETTLEMENT AGREEMENTS ARE FAIR AND EQUITABLE

51. The standard for approving a settlement agreement is whether the compromise is "fair and equitable." *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson,* 390 U.S. 414, 424, 88 S.Ct. 1157, 20 L.Ed.2d 1 (1968).

52. A settlement's fairness and reasonableness is determined with reference to a number of factors, including the balance between the likelihood of success compared to the present and future benefits offered by the settlement; the prospect of complex and protracted litigation if settlement is not approved; the competency and experience of counsel who support the settlement; the relative benefits to be received the settling parties; the nature and breadth of releases to be obtained; and the extent to which settlement is the product of arm's length bargaining.

Nellis v. Shugrue, 165 B.R. 115, 122 (S.D.N.Y. 1994).

53. The inquiry is whether the settlement falls below the lowest point in the range of reasonableness. *In re W.T. Grant Co.*, 699 F.2d 599, 608 (2d Cir.1983).

54. Each of these settlements is advantageous from the plaintiffs' perspective, as they provide Manville claimants with a significant new source of asbestos compensation. Tellingly, after noticing the proposed settlements to millions of individuals, not a single particularized objection was lodged concerning whether the amount of the settlements (including the attorney's fees provided pursuant to the settlement agreements) were fair and reasonable.

55. Further, the agreements were "the product of good faith, arms-length negotiations" among the parties. Mediator's Final Report ¶ 4.

CONCLUSION

WHEREFORE, it is hereby ordered, adjudged and decreed that Travelers Motions to Approve: (i) Settlement Of Statutory Direct Action Claims And Entry Of Clarifying Order, (ii) Settlement Of Common Law Direct Action Claims And Entry Of Clarifying Order, and (iii) Hawaii Direct Action Settlement Agreement, are GRANTED and the settlements are APPROVED, and the Clarifying Order shall enter.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Argued October 30, 1987
Decided January 19, 1988

Nos. 402, 403,
Dockets 87-5030, 87-5038

In re JOHNS-MANVILLE CORPORATION, *et al.*,

Debtors.

MACARTHUR COMPANY and
WESTERN MACARTHUR COMPANY,

Appellants,

—v.—

JOHNS-MANVILLE CORPORATION, MANVILLE CORPORATION, MANVILLE INTERNATIONAL CORPORATION, MANVILLE EXPORT CORPORATION, JOHNS-MANVILLE INTERNATIONAL CORPORATION, MANVILLE SALES CORPORATION, f/k/a JOHNS-MANVILLE SALES CORPORATION, successor by merger to MANVILLE BUILDINGS MATERIALS CORPORATION, MANVILLE PRODUCTS CORPORATION, AND MANVILLE SERVICE CORPORATION, MANVILLE INTERNATIONAL CANADA, INC., MANVILLE CANADA, INC., MANVILLE INVESTMENT CORPORATION, MANVILLE

PROPERTIES CORPORATION, ALLAN-DEANE CORPORATION, KEN-CARYL RANCH CORPORATION, JOHNS-MANVILLE IDAHO, MANVILLE CANADA SERVICE INC., and SUNBELT CONTRACTORS, INC.,

Appellees.

Debtor moved for approval of proposed settlement with products liability insurers and for order enjoining all future suits against insurers related to settled policies. The United States Bankruptcy Court for the Southern District of New York, Burton R. Lifland, Chief Judge, entered order approving settlements and enjoining suits, and appeal was taken. The District Court, Whitman Knapp, J., affirmed. Appeal was taken. The Court of Appeals, Jon O. Newman, Circuit Judge, held that: (1) any rights that distributor might have in debtor's products liability policies, pursuant to vendor endorsements contained therein, were derivative of and inseparable from debtor's own rights, so as to fall within Bankruptcy Court's jurisdiction over property of debtor's estate, and (2) Bankruptcy Court did not exceed its authority when, in approving settlement of debtor's claims against products liability insurers, it enjoined suits against insurers.

Affirmed.

John H. Faricy, Jr., Minneapolis, Minn. (Pustorino, Pederson, Tilton, & Parrington, Minneapolis, Minn., James J. Higgins, Boyar, Hig-

gins & Hayden, New York City, on the brief), for appellants.

Lowell Gordon Harriss, New York City (Laureen F. Bedell, Gregor Baer, Davis Polk & Wardwell, Herbert Stephen Edelman, Andrew A. Kress, Levin & Weintraub & Crames, New York City, on the brief), for appellees.

Before

NEWMAN, WINTER and MINER,
Circuit Judges.

JON O. NEWMAN, Circuit Judge:

MacArthur Company and Western MacArthur Company (collectively "MacArthur") appeal from an order of the District Court for the Southern District of New York (Whitman Knapp, Judge) affirming orders of the Bankruptcy Court (Burton R. Lifland, Chief Judge) entered in connection with the Chapter 11 proceeding of the Johns-Manville Corporation ("Manville"). The orders of the Bankruptcy Court approved settlements between Manville and various of its insurance carriers and enjoined all suits against the insurers related to the settled policies. MacArthur, a distributor of Manville's asbestos, claims to be a coinsured under the settled policies by virtue of "vendor endorsements" contained in the policies. It argues that the Bankruptcy Court was without

jurisdiction or authority to issue the injunctive orders, which prevent it from suing the insurers. We conclude that the Bankruptcy Court had jurisdiction over the insurance policies as property of the debtor's estate. Moreover, the court had authority to issue the injunctive orders pursuant to its power to dispose of a debtor's property free and clear of third-party interests and to channel such interests to the proceeds of the disposition. The order of the District Court is affirmed.

Background

On August 26, 1982, Johns-Manville Corporation filed a petition for reorganization under Chapter 11 of the United States Bankruptcy Code. The filing was largely in response to Manville's potential liability to persons with latent asbestos-related disease caused by Manville's asbestos products. As has been explained during earlier proceedings in the Manville reorganization, Manville faced the possibility of suits by tens of thousands of as yet unknown asbestos victims, amounting to a potential liability of more than two billion dollars. *See Johns-Manville Corp. v. Asbestos Litigation Group (In re Johns-Manville Corp.)*, 26 B.R. 420 (Bankr.S.D.N.Y.1983), *aff'd*, 40 B.R. 219 (S.D.N.Y.1984); *GAF Corp. v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 26 B.R. 405 (Bankr.S.D.N.Y.1983), *aff'd*, 40 B.R. 219 (S.D.N.Y.1984).

At the time of its Chapter 11 filing, Manville was engaged in extensive litigation with its insurance carriers concerning its coverage for

asbestos-related liabilities. In order to avoid the uncertainty of the insurance litigation and to provide funding for its plan of reorganization, Manville endeavored to settle its insurance claims. Between 1984 and 1986, the insurers agreed to settle with Manville for approximately $770 million. The settlements provided that, in exchange for cash payments, the insurers would be relieved of all obligations related to the disputed policies and the insurers would be protected from claims based on such obligations by injunctive orders of the Bankruptcy Court. The insurers are entitled to terminate the settlements if the injunctive orders are not issued or if they are set aside on appeal. Since the insurance settlements are a cornerstone of Manville's proposed plan of reorganization, *see Johns-Manville Corp. v. Asbestos Litigation Group (In re Johns-Manville Corp.)*, 33 B.R. 254, 267 (Bankr.S.D.N.Y. 1983), the Bankruptcy Court's orders are a critical part of the entire reorganization.

MacArthur is a distributor of Manville's asbestos products. It claims to be a coinsured under some of Manville's insurance policies pursuant to "vendor endorsements" contained in the policies. The vendor endorsements entitle distributors to insurance coverage for liability resulting from their sale of Manville's products. The endorsements are subject to the payment limits and other restrictions of the underlying policies; thus, if the product liability aggregate limits in the underlying Manville policies have been exhausted, the insurer has no independent obligation to pay distributors on product liability

claims. It is disputed whether Manville's policy limits have been exhausted.

MacArthur objected to the Bankruptcy Court's approval of the insurance settlements on the ground that the proposed injunctions would impair its rights under the vendor endorsements.[1] MacArthur argued that it had recently been sued because of its sale of Manville's asbestos, that it was entitled to coverage from the settling insurers, and that its contractual rights could not lawfully be extinguished by the Bankruptcy Court's injunctive orders. MacArthur suggested that the Bankruptcy Court's orders would be permissible only if the Court extended the protection of the injunction to MacArthur, that is, if asbestos-related suits were barred against MacArthur as well as against the settling insurers. The Bankruptcy Judge dismissed MacArthur's objections from the bench, reasoning that its "interest in the policies is highly speculative" and that any claim it had, based on Manville's insurance, could be asserted in the Bankruptcy Court. By orders dated December 18, 1986, and January 14, 1987, the Bankruptcy Court approved the insurance settlements and enjoined all suits against the insurers "based upon, arising out of, or related to the [settled] policies." The Bankruptcy Court's orders further provided that the settlement fund was subject to the continuing jurisdiction of the Bankruptcy Court and that law suits subject to the injunction "are transferred, and shall attach, solely to the Settlement Fund." On July 15, 1987, the District

[1] Neither MacArthur nor any other party has challenged the fairness of the $770 million settlement amount.

Court affirmed the orders of the Bankruptcy Court. This appeal followed.

Discussion

MacArthur's primary contention on appeal is that the Bankruptcy Court lacked jurisdiction and authority to enjoin suits against Manville's insurers. MacArthur argues that the injunctive orders constitute a *de facto* discharge in bankruptcy of non-debtor parties not entitled to the protection of Chapter 11. MacArthur insists that its interests in the vendor endorsements is a contractual right solely between it and the non-debtor insurance companies and is therefore beyond the reach of the Bankruptcy Court. The flaw in MacArthur's reasoning is that the injunctive orders do not offer the umbrella protection of a discharge in bankruptcy. Rather, they preclude only those suits against the settling insurers that arise out of or relate to Manville's insurance policies. Moreover, claims against the insurers based on Manville's policies are not extinguished; they are simply channeled away from the insurers and redirected at the proceeds of the settlement. The Bankruptcy Court properly issued the orders pursuant to its equitable and statutory powers to dispose of the debtor's property free and clear of third-party interests and to channel those interests to the proceeds thereby created.

It is well established that a bankruptcy court has jurisdiction over all of the property of the debtor's estate, wherever located. *See Straton v. New,* 283 U.S. 318, 320-21, 51 S.Ct. 465, 466, 75 L.Ed. 1060 (1931) (purpose of bankruptcy law is

"to place the property of the bankrupt, wherever found, under the control of the court, for equal distribution among the creditors"); *Loewi Realty Corp. v. Chanticleer Assoc., Ltd. (In re Chanticleer Assoc., Ltd.)*, 592 F.2d 70, 73-74 (2d Cir. 1979) (bankruptcy court's "power to preserve its jurisdiction by enjoining proceedings that would remove property from the bankrupt estate is fundamental"); 28 U.S.C.A. § 1334(d) (West Supp. 1987) (district court sitting in bankruptcy has jurisdiction over "all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate"); 28 U.S.C. § 157(b)(2) (Supp. III 1985) ("core proceedings" in which bankruptcy judges may issue final orders include proceedings related to the property of the estate). The Bankruptcy Code broadly defines property of the estate as "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1) (1982). This provision has been construed expansively: "The scope of this paragraph [section 541(a)(1)] is broad. It includes all kinds of property, including tangible or intangible property, causes of action . . . and all other forms of property currently specified in Section 70a of the Bankruptcy Act." *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 205 n. 9, 103 S.Ct. 2309, 2313 n. 9, 76 L.Ed.2d 515 (1983) (quoting S.Rep. No. 989, 95th Cong., 2d Sess. 82 (1978), *reprinted in* 1978 U.S.Code Cong. & Admin. News 5787, 5868). In *Whiting Pools*, the Supreme Court held that the property of the estate includes assets seized by a creditor prior to the filing of the bankruptcy petition. The

Court explained that "[b]oth the congressional goal of encouraging reorganizations and Congress' choice of methods to protect secured creditors suggest that Congress intended a broad range of property to be included in the estate." 462 U.S. at 204, 103 S.Ct. at 2313; *accord Johns-Manville Corp. v. Asbestos Litigation Group (In re Johns-Manville Corp.), supra*, 40 B.R. at 230.

Numerous courts have determined that a debtor's insurance policies are property of the estate, subject to the bankruptcy court's jurisdiction. During earlier proceedings in the present case, the Bankruptcy Court held that the automatic stay provision of the Code, 11 U.S.C. § 362(a) (1982 & Supp. IV 1986), which prevents suits against the debtor or his property after a petition is filed, authorized an injunction that barred claims by asbestos victims against Manville's insurers in jurisdictions allowing direct actions against the insurers. *Johns-Manville Corp. v. Asbestos Litigation Group (In re Johns-Manville Corp.), supra,* 26 B.R. at 435-36 (on rehearing), *aff'd,* 40 B.R. at 230-31. The Court found that Manville's insurance policies and their proceeds were "substantial property of the Manville estate which will be diminished if and to the extent that third party direct actions against the insurance carriers result in plaintiffs' judgments." 26 B.R. at 435. The Fifth Circuit has followed this analysis, enjoining suits against Manville's insurers in Louisiana, a state that permits direct actions. *See In re Davis,* 730 F.2d 176, 184 & n. 25 (5th Cir.1984). Other courts are in agreement. *E.g. A.H. Robbins Co. v. Piccinin (In re A.H. Robbins Co.),* 788 F.2d 994, 1001-02

(4th Cir.), *cert. denied*, — U.S. —, 107 S.Ct. 251, 93 L.Ed.2d 177 (1986); *Pearl-Wick Corp. v. John Hancock Mutual Life Insurance Co. (In re Pearl-Wick Corp.)*, 15 B.R. 143, 148 (Bankr.S.D.N.Y. 1981), *aff'd*,26 B.R. 604 (S.D.N.Y.), *aff'd*, 697 F.2d 295 (2d Cir.1982); *In re Moskowitz*, 13 B.R. 357, 360 (Bankr.S.D.N.Y.1981); *Brenham v. Deerfield Organization, Inc. (In re Norman Industries)*, 1 B.R. 162, 166 (Bankr.W.D.La.1979).

MacArthur insists that while Manville's interests in the settled insurance policies may be subject to the jurisdiction of the Bankruptcy Court, those interests are separate and distinct from MacArthur's own contractual rights, which the Bankruptcy Court may not impair. MacArthur contends that because its own rights are separate from Manville's, its claims under the vendor endorsements are too remote from the Chapter 11 proceeding to permit the Bankruptcy Court to exercise jurisdiction. *See Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 83-87, 102 S.Ct. 2858, 2877-80, 73 L.Ed.2d 598 (1982); 1 King, *Collier on Bankruptcy* ¶ 3.01 at 3-29 (15th ed. 1987). MacArthur's position is unsupported in the record. The vendor endorsements cover only those liabilities resulting from the vendor's status as a distributor of Manville's products. The endorsements are limited by the product liability limits of the underlying Manville policies and are otherwise subject to all of the terms of the underlying policies. MacArthur's rights as an insured vendor are completely derivative of Manville's rights as the primary insured. Such derivative rights are no different in this respect from those of the

asbestos victims who have already been barred from asserting direct actions against the insurers. *See In re Davis, supra.* MacArthur asserts contractual obligations whereas the direct action plaintiffs' claims sounded in tort; nevertheless, in both instances, third parties seek to collect out of the proceeds of Manville's insurance policies on the basis of Manville's conduct. In both cases, plaintiffs' claims are inseparable from Manville's own insurance coverage and are consequently well within the Bankruptcy Court's jurisdiction over Manville's assets. *See In re Davis,* 730 F.2d at 183 (rejecting claim that direct actions against insurers have no reasonable nexus with bankruptcy proceedings).

Having properly exercised jurisdiction over the insurance policies, the Bankruptcy Court had the authority to approve the settlements and to channel claims arising under the policies to the proceeds of the settlement. In *Van Huffel v. Harkelrode,* 284 U.S. 225, 52 S.Ct. 115, 76 L.Ed. 256 (1931), the Supreme Court explained that even absent express statutory authority, the Bankruptcy Court had the inherent equitable power to sell a debtor's property and to transfer third-party interests to the proceeds of the sale. 284 U.S. at 227-28, 52 S.Ct. at 116. *See also Ray v. Norseworthy,* 90 U.S. (23 Wall.) 128, 134-35, 23 L.Ed. 116 (1874) (court may sell bankrupt's property encumbered by third-party claims as long as third parties retain their respective priorities in the proceeds of the sale); *Fierman v. Seward National Bank,* 37 F.2d 11, 13 (2d Cir.1930) ("When the bankrupt's property was sold free of liens, the liens upon the property became rights

against the substituted proceeds of sale, and claimants to this fund were obliged to assert their rights by applying to the court in whose custody it was."); *In re Penn Central Transportation Co.*, 383 F.Supp. 1128, 1130 (E.D.Pa. 1974) (power of a reorganization court to transfer interests in debtor's property to the proceeds of a sale is well established). The Bankruptcy Code provides statutory authority for the channeling orders. 11 U.S.C. § 363(f) (1982 & Supp. IV 1986) permits, under certain circumstances, sales of property in the debtor's estate "free and clear of any interest in such property of an entity other than the estate." One of the circumstances permitting such sales is that the third-party interest be in *bona fide* dispute. 11 U.S.C. § 363(f)(4). In the present case, such a dispute exists because Manville claims that the product liability limits on the policies to which the vendor endorsements attach have been exhausted. The Bankruptcy Judge appears to have substantially accepted Manville's contention, as he found that MacArthur's interest in the settled policies was "highly speculative."

The injunctive orders issued by the Bankruptcy Court were necessary to effectuate the Court's channeling authority, that is, to make sure that claims to Manville's insurance proceeds were, in fact, channeled to the settlement fund and could not be asserted directly against the insurers. The authority to issue the injunction is thus a corollary to the power to dispose of assets free and clear and to channel claims to the proceeds.

> The Bankruptcy Court, having jurisdiction over the property of the Bankrupt, and having jurisdiction to order the sale of the Bankrupt's property and to determine the nature, extent and validity of liens asserted against the proceeds, had jurisdiction to enjoin a lien-holder from attempting to assert his lien against property in the hands of a purchaser who has acquired from the Bankruptcy Court a title free and clear of liens and encumbrances.

Whitehead & Kales Co. v. Dempster (In re Wiltse Bros. Corp.), 361 F.2d 295, 299 (6th Cir.1966) (citing *Van Huffel v. Harkelrode, supra*). Additional authority for the injunction is to be found in section 105(a) of the Bankruptcy Code, which permits the Bankruptcy Court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a) (Supp. IV 1986). This provision has been construed liberally to enjoin suits that might impede the reorganization process. *See Manville Corp. v. Equity Security Holders Committee (In re Johns-Manville Corp.)*, 801 F.2d 60, 64 (2d Cir.1986); *In re Davis, supra,* 730 F.2d at 183-84. In this case, the Bankruptcy Court found as a fact that to permit actions against Manville's insurers arising from Manville's policies would adversely affect property of the estate and would interfere with reorganization. *Johns-Manville Corp. v. Asbestos Litigation Group, supra,* 26 B.R. at 435-36.

Admittedly, the insurance settlement and accompanying injunction in this case are not pre-

cisely the same as the traditional sale of real property free and clear of liens followed by a channeling of the liens to the proceeds of the sale. *E.g. Van Huffel v. Harkelrode, supra.* Here, the property of the estate at issue (insurance policies) was not technically "sold"; rather, Manville liquidated its interest via a voluntary settlement. Moreover, the claims on the property-MacArthur's interest under the vendor endorsements, or in the earlier stages of this litigation, health claimants' direct actions-are different from the liens on real property that are traditionally the subject of the bankruptcy court's equitable channeling power. *But cf. Forde v. Kee-Lox Manufacturing Co.*, 437 F.Supp. 631, 634-35 (W.D.N.Y.1977) (trustee permitted to sell debtor's estate free and clear of a civil rights claim), *aff'd on other grounds*, 584 F.2d 4 (2d Cir.1978); *Rubinstein v. Alaska Pacific Consortium (In re New England Fish Co.)*, 19 B.R. 323, 329 (Bankr.W.D.Wash.1982) (same). Nevertheless, the underlying principle of preserving the debtor's estate for the creditors and funneling claims to one proceeding in the bankruptcy court remains the same. The principle is a fundamental part of the bankruptcy law. Particularly since the insurance settlement/injunction arrangement was essential in this case to a workable reorganization, it falls well within the bankruptcy court's equitable powers "which traditionally 'have been invoked to the end that . . . substance will not give way to form, that technical considerations will not prevent substantial justice from being done.'" *In re UNR Industries, Inc.*, 725 F.2d 1111, 1119 (7th Cir.1984) (quoting

Pepper v. Litton, 308 U.S. 295, 305, 60 S.Ct. 238, 244, 84 L.Ed. 281 (1939)).

MacArthur contends that the Bankruptcy Court's orders are unfair. MacArthur asserts that it has been forced to accept the burden of asbestos victims' suits without the protection of the insurance coverage to which it is entitled. Even if we assume that MacArthur could show that it has a valid claim against the insurers, MacArthur is not left without a remedy: It may proceed in the Bankruptcy Court against the $770 million settlement fund. It has long been recognized that when a debtor's assets are disposed of free and clear of third-party interests, the third party is adequately protected if his interest is assertable against the proceeds of the disposition. *See Ray v. Norseworthy, supra,* 90 U.S. at 134-35; S.Rep. No. 989, 95th Cong., 2d Sess. 56 (1978), *reprinted in* 1978 U.S.Code Cong. & Admin. News 5787, 5842 (committee report on 11 U.S.C. § 363(f)) ("Most often, adequate protection in connection with a sale free and clear of other interests will be to have those interests attach to the proceeds of the sale."). In the present case, the injunctive orders of the Bankruptcy Court make clear that claims arising from the settled insurance policies attach to the settlement fund. It may well be that MacArthur would prefer to assert its interest in Manville's property in a proceeding other than that in the Bankruptcy Court, but such a result is not required by the bankruptcy law.

We have considered MacArthur's contention that it was denied due process of law because it received notice of the insurance settlements only

after the settlements had been negotiated. This contention is without merit because MacArthur and all other interested parties were provided with notice and a hearing before the settlements were approved by the Bankruptcy Court. The notice of proposed settlements issued by the Bankruptcy Court met the requirements of due process. *See Handschu v. Special Services Division,* 787 F.2d 828, 832-33 (2d Cir.1986).

The decision of the District Court affirming the orders of the Bankruptcy Court is affirmed.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Nos. 86 Civ. 6124 (WK), 87 Civ. 0139 (WK),
87 Civ. 0699 (WK), 87 Civ. 0700 (WK),
87 Civ. 0701 (WK), 87 Civ. 0847 (WK)
and 87 Civ. 1283 (WK)

July 15, 1987

In re
JOHNS-MANVILLE CORP., *et al.*

The Bankruptcy Court, 68 B.R. 618, Burton R. Lifland, Chief Judge, entered order approving reorganization plan for Chapter 11 debtor, which was facing massive toxic tort liability arising out of asbestos-related health and property claims. Certain groups appealed. The District Court, Whitman Knapp, J., held that plan could be approved, notwithstanding objections by debtor's shareholders, debtor's coinsured, alliance of asbestos health claimants, and other companies with potential asbestos-related liability.

So ordered.

L. Gordon Harriss, Davis Polk & Wardwell, New York City, Michael J. Crames, Levin & Weintraud & Crames, New York City, for debtors.

David H. Remes, Covington & Burling, Washington, D.C., for Armstrong World Indust.

Richard Lieb, Kronish Lieb Weiner & Hellman, New York City, for Certain Holders of Common Stock.

Elihu Inselbuch, Caplin & Drysdale, Chartered, New York City, for Asbestos Health Committee.

George A. Hahn, Hahn & Hessen, New York City, for Equity Security Holders Committee.

Matthew Gluck, Fried Frank Harris Shriver & Jacobson, New York City, for Leon Silverman, Legal Representative.

Batya Roth, Securities & Exchange Com'n, Washington, D.C.

John J. Jerome, Milbank, Tweed, Hadley & McCloy, New York City, for Creditors Committee.

Virginia M. Handal, Securities & Exchange Commission, New York City.

Ellen R. Werther, Weil Gotshal & Manges, New York City, for Owens-Illinois.

Michael L. Goldberg, Aaron H. Simon, Charles B. O'Reilly, George M. Rosenberg, Greene O'Reilly, Broillet, Paul, Simon, McMillan, Wheeler & Rosenberg, Washington, D.C., Vern Countryman, Cambridge, Mass., for Lawrence Kane Objectors; Jerrold T. Doros, Doros & Blessey, P.C., New York City, of counsel.

Robert Somma, Goldstein & Manello, Boston, Mass., for State Government Creditors Committee.

Ellen P. Chapnick, Wolf Popper Ross Wolf & James, New York City, for Schools Committee.

Charles F. Vihon, Gaston Snow & Ely Bartlett, Boston, Mass., for University of Missouri and Hospitals.

Michael O. Young, Deputy Chief, Office of Corp. Counsel, Affirmative Lit. Bureau, New York City.

Roy H. Carlin, Windels, Marx, Davies & Ives, New York City, for referred Stockholders Committee.

John F. Banzhoff, III, Action on Smoking & Health, Washington, D.C., pro se.

Harold Jones, U.S. Trustee, New York City.

E. Judge Elderkin, Frederick D. Holden, Jr., Brobeck Phleger & Harrison, San Francisco, Cal., for Fibreboard Corp.

Marc L. Greenberg, Eagle-Picher Industries, Inc., Cincinnati, Ohio.

James E. Hipolit, Acands, Inc., Lancaster, Pa.

George M. Cheever, Kirpatrick & Lockhart, Pittsburgh, Pa., for H.K. Porter Co.

Howard I. Rhine, Coleman & Rhine, New York City, for Armstrong World Industries, Inc.

Baldo M. Carnecchia, Jr., Montgomery McCraken & Walker, Philadelphia, Pa., for Celotex, Corp.

MEMORANDUM & ORDER

WHITMAN KNAPP, District Judge.

On August 26, 1982 Johns-Manville Corporation and affiliated entities ("Manville") filed petitions for reorganization pursuant to Chapter 11 of the Bankruptcy Code. At that time Manville faced massive toxic tort liability, arising principally from asbestos related health and property claims, as well as the certainty of many, many more such claims in the future. In the ensuing nearly five years, the parties and Bankruptcy Judge Lifland have worked with skill and ingenuity to fashion a suitable plan of reorganization. Such a plan must provide for the compensation of today's asbestos victims without exhausting the resources necessary to care for tomorrow's victims. It must simultaneously account to the different types of potential tort plaintiffs, to creditors of Manville and to its shareholders. And it must do so within the framework of Chapter 11, since no other vehicle exists to deal with what is said to be the largest and most complex bankruptcy reorganization in history. *Cf. In re Johns-Manville Corp.*, (2d Cir.1986) (Oakes J., dissenting) 801 F.2d 60, 69-70; *In re Johns-Manville Corp.* 824 F.2d 176 (2d 1987).

On December 18, 1986 Judge Lifland entered an order approving the Second Amended and Restated Plan of Reorganization of Manville (the "Plan"). Although the Plan was largely consensual, certain groups have appealed from that Order, and from other virtually contemporaneous Orders which were necessary prerequisites of the Plan. Those appeals have been consolidated

before us. Briefs were filed, and on June 19, 1987 we heard oral argument on the following issues:

1) The Individual Shareholder Appellants ("Wright Group") appeal from the Order of Substantive Consolidation which brought together all the Manville entities for purposes of this reorganization, and also argue that the "cram-down" of the Plan under 11 U.S.C. § 1129(a) was improper because the Plan was not "fair and equitable" to the holders of Manville common stock.

2) The MacArthur Company appeals from the Order approving Manville's settlements with its insurance companies, claiming that MacArthur's rights as a co-insured have thereby been unjustly impaired.

3) The Kane Group, an alliance of asbestos health claimants who seek to bar future health claimants from participating in the Plan, argue that issuance of the injunction which prohibits present claimants from suing Manville and permits them only to sue a Trust Fund created under the Plan, was beyond the power of the Bankruptcy Court and that the Bankruptcy Court had no power over future claimants who do not have "claims" within the meaning of the Bankruptcy Code.

4) The Armstrong Appellants (including other companies with potential asbestos-related liability) argued that the Plan should more readily permit the Trustees of the Plan to join the "Wellington Facility," an industry-wide claims handling organization.

5) The Securities and Exchange Commission ("S.E.C.") argues that it was reversible error for Judge Lifland to have declined to appoint an "official" committee to represent the interests of the common shareholders.

We have carefully reviewed the various opinions written by Judge Lifland with respect to all of these contentions. With one exception about to be noted, we see no occasion for further writing on these subjects and affirm for substantially the reasons set forth in his various opinions.

The contention that Judge Lifland committed reversible error in declining to appoint an official committee is presented by the appeal of the Wright Group, supported by the S.E.C. By our Memorandum and Order of July 8, 1987, we directed further oral argument on a question relevant to that appeal. Decision as to that question is hereby reserved.

All other decisions by Judge Lifland are hereby affirmed.

SO ORDERED.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Bankruptcy No. 82 B 11656/76
December 18, 1986
As Amended December 19
and December 23, 1986

In the Matter of
JOHNS-MANVILLE CORPORATION,

Debtor.

Matter came before court for confirmation of Chapter 11 plan of asbestos-related debtor. The Bankruptcy Court, Burton R. Lifland, Chief Judge, held that: (1) bankruptcy court had authority to issue injunction prohibiting asbestos-related claimants from bringing suit against reorganized entities or from seeking punitive damages; (2) disclosure statement was nonflawed; and (3) debtor in possession established by convincing evidence that plan was fair and equitable in accordance with cramdown requirements.

Order accordingly.

Levin & Weintraub & Crames, New York City, for debtors; Michael J. Crames, and Herbert S. Edelman, and Andrew Kress, and Edmund M. Emrich, of counsel.

Davis, Polk & Wardwell, New York City, for debtors; Stephen Case, and Lowell Gordon Harriss, and Laureen Bedell, of counsel.

Milbank, Tweed, Hadley & McCloy, New York City, for Creditors Committee; John J. Jerome, and John Gellene, of counsel.

Fried, Frank, Harris, Shriver & Jacobson, New York City, for Leon Silverman, Legal Representative; Matthew Gluck, of counsel.

Caplin & Drysdale, Chartered, New York City, for Asbestos Health Committee; Elihu Inselbuch, of counsel.

Hahn & Hessen, New York City, for Equity Security Holders Committee; George Hahn, of counsel.

Kronish, Lieb, Weiner & Hellman, New York City, for Certain Holders of Common Stock; Richard Lieb, and Laurence J. Kaiser, of counsel.

Covington & Burling, Washington, D.C., for Armstrong World Industries; David H. Remes, of counsel.

Coleman & Rhine, New York City, for Armstrong World Industries, Inc.; Howard I. Rhine, of counsel.

Jane Bevans, New York City, for Protestant Episcopal Schools.

Greene, O'Reilly, Broillet, Paul, Simon, McMillan, Wheller & Rosenberg, Washington, D.C., for Lawrence Kane Objectors; Vern Countryman, and George Rosenberg, and Michael L. Goldberg, of counsel.

Nathan M. Fuchs, Virginia M. Handal, New York Regional Office United States Securities and Exchange Commission.

Weil, Gotshal & Manges, New York City, for Owens-Illinois; Ellen Werther, of counsel.

Whitman & Ransom, New York City, for U.S. Trust Company of New York; William M. Kahn, of counsel.

Wolf, Popper, Ross, Wolf & Jones, New York City, for Schools Committee; Ellen Chapnick, of counsel.

Gaston, Snow & Ely Bartlett, Boston, Mass., for University of Missouri and Hospitals; Charles F. Vihon, of counsel.

Goldstein & Manello, Boston, Mass., for State Government Creditors Committee; Robert Somma, of counsel.

Earl Parker, for Johns-Manville Corporation.

BURTON R. LIFLAND, Chief Judge.

I Introduction

Several days ago these huge, complex, unparalleled reorganization proceedings entered into a new phase, when their largely consensual plan was formally brought before this court as a candidate for confirmation.

Manville originally filed its petition for reorganization under chapter 11 in August of 1982. The troubled history of these reorganization proceedings has been discussed in some detail, most recently in *Equity Security Holder's Committee v. Johns-Manville Corp., (In re Johns-Manville*

Corp.), 66 B.R. 517 (Bankr.S.D.N.Y.1986), *aff'd mem,* (S.D.N.Y. December 9, 1986). There is little need to review the Manville saga today, except to highlight some of the most recent events in the case. On November 20, the Debtor announced preliminary voting results on its reorganization plan. According to those results, the plan was overwhelmingly accepted by Asbestos Health Claimants, Property Damage Claimants, Unsecured Creditors and Preferred Shareholders. Common Shareholders were the only class to reject the plan.

The District Court has upheld this court's recent rulings denying the appointment of official committees to represent equity interests, *Carl M. Albero, Morton Macks et. al. v. Johns-Manville Corp., Official Committee of Unsecured Creditors, United States Trustee, the Official Committee of Asbestos-Related Litigants and/or Creditors and the Legal Representative for Future Claimants. (In re Johns-Manville Corp.)*, 68 B.R. 155, (S.D.N.Y.1986); and its decision enjoining the calling of a meeting of the Debtor's shareholders, *supra*. The Debtor's settlements with its insurance carriers, then totalling more than $700 million, were approved by this court, after a hearing on their fairness, held November 19, 1986. The Debtor subsequently concluded settlements with its remaining carriers. The various chapter 11 cases filed by the Debtor and its subsidiaries were substantively consolidated after a hearing before this court on December 9, 1986.

By means of an order submitted to this court on December 12, 1986, Hahn & Hessen, Esqs. sought to withdraw the objections to confirma-

tion previously filed on behalf of the Official Committee of Equity Security Holders (the "Equity Committee"), its individual members, and any successor committee on November 14, 1986. By endorsement the order was declined because, *inter alia,* it was noted to have been brought inappropriately and in an untimely manner. The withdrawal request was renewed at the confirmation hearing and was again refused. Accordingly, the filed objections shall be considered, along with the others.

The plan is the product of more than four years of effort to grapple with a social, economic and legal crisis of national importance within the statutory framework of chapter 11. Not surprisingly, this largely consensual plan is, by virtue of necessity, both creative and pragmatic in the solutions it proposes in response to the problems that afflict the Debtor, and indeed all parties in this reorganization.

One of the most innovative and unique features of the Manville Plan of Reorganization (the "Plan") is the establishment of two Trusts out of which all asbestos-related claims will be paid. An understanding of the features of these Trusts is necessary before an informed evaluation of the Plan, under the standards of § 1129 can be made.

The Asbestos Health Trust (the "Trust" or the "AH Trust") is a facility designed to resolve the claims of victims of asbestos-related diseases. It should be emphasized that this Trust draws no distinction between victims on the basis of the date of the manifestation of their disease. The Trust will initially be funded with $815 million in cash, receivables and insurance proceeds. The

Trust will also receive $75 million per year from Manville for a 24 year period commencing 3 years after its inception. Ultimate funding is in excess of approximately $2.5 billion. In addition, the Trust will own or have access to up to 80% of Manville's common stock. Finally, the Trust will have the right to call on up to 20% of the profits of the corporation, beginning 4 years after its inception and continuing for as long as necessary to satisfy asbestos health claims.

Two aspects of the financial structure of the Trust should especially be noted. First, the Trust, as a fiduciary for asbestos health victims will be the single largest stockholder in the reorganized debtor. The effect of this Plan will be to give the "tort victims" the beneficial interest in the ongoing operating corporate entity. Second, the Trust is guaranteed an "evergreen" source of funding by virtue of its 20% call on profits of the operating corporation. This funding of the Trust will continue until the last asbestos victim is found and paid. Thus an effort to determine the number and amount of AH claims with exactitude is not imperative. The imperative rather, is to ensure to the greatest degree possible the continuing viability of the reorganized corporation, which will fund the Trust, whatever the number and amount of claims happen to be. To protect and preserve the Manville operating entity, to help ensure the Trust's ability to honor its commitments, and to enhance the market value of the Trust's stock, the operating entities will be protected from further asbestos-related litigation by a combination of the discharge provisions of the Code and an injunction order (the "Injunc-

tion") prohibiting all parties with asbestos-related personal injury or property damage claims from suing certain protected entities.

The Property Damage Trust (the "PD Trust") is, similarly, a facility for resolving Class 5 asbestos-related property claims. The Trust will be funded initially with $125 million and will be entitled to any insurance settlement proceeds in excess of $615 million. To this will be added the remaining assets of the AH Trust, upon its termination.

A. Objections to Confirmation

Before discussing the Debtor's Plan in the context of § 1129 requirements, the court notes that the following objections to confirmation, many of which are on common grounds, have been filed:

1) A common shareholder, John MacLean, has challenged a provision of the Plan under which attorneys representing asbestos health claimants will be paid legal fees without review of those fees by this court.

2) Several Co-Defendants (the "Armstrong Objectors") have challenged the ability of the Asbestos Health Trust (the "AH" Trust") to satisfy all liabilities assumed by the Trust and provisions of the Plan which the Armstrong Objectors claim would disable the Trust from entering an industry wide claims handling facility, commonly known as the "Wellington Plan".

3) A group of Asbestos Health Victims (the "Kane Objectors") raise the following objections to the Plan:

a) The legal validity of that part of the Plan which seeks to enjoin asbestos-related suits against the reorganized Debtor (the "Injunction");

b) The terms of the Plan which transfer property of the estate to Class 6 claimants in lieu of post-petition interest;

c) The features of the Injunction which disallow punitive damages in asbestos-related claims against the Trusts;

d) The Debtor's estimates of the number of present and future asbestos health claims and the average costs of their disposition and thereby the feasibility of the Plan;

e) The validity of the voting procedures employed with respect to AH Claimants;

f) The Debtor's good faith in proposing the Plan; and

g) The Kane Objectors also assert that the Trust provided for in the Plan essentially amounts to a fraudulent conveyance. The court specifically finds that the Kane Objectors submitted neither credible evidence nor persuasive legal arguments that the provisions of this Plan meet those statutory prerequisites of §§ 544, 547 or 548 of the Code necessary to establish a fraudulent conveyance. Indeed, the court considers this objection only to the extent that it wishes to review all objections to confirmation.

4) The Equity Committee and the Wright Group (the "Equity Interests") have raised the following objections to the confirmation of the Plan:

a) The validity of the Injunction sought under the Plan;

b) The validity of Plan provisions which accommodate for the payment of future claims;

c) That portion of the Plan which provides consideration to Class 6 claimants in lieu of post-petition interests;

d) The provision of the Plan whereby attorneys representing AH victims would receive fees which have not been subject to court review;

e) That the Debtor has not proposed the Plan in good faith;

f) That confirmation votes were solicited on the basis of a misleading Disclosure Statement;

g) That the Plan is not in the best interests of common shareholders;

h) That the Plan is not feasible;

i) The provisions of the Plan which provide for $5 million of Trust funds to be spent on charitable purposes related to the treatment of asbestos-caused diseases; and provisions of the Plan which would allow, upon termination of both the AH and PD Trusts, a portion of the remaining assets in

the Trust to be applied to charitable purposes related to the treatment of asbestos related diseases. The $5 million charitable contribution inures to the direct benefit of AH victims and objections to it are unfounded. Objections to the distribution of some of the remaining Trust assets to charitable causes, are based on unrealistic and speculative assumptions which the court does not find credible. Furthermore, this distribution of the remainder of the Trust allows for favorable tax treatment benefiting the Trust which will inure to the benefit of health claimants. *See* Transcript of Fairness Hearing on Insurance Settlements, November 19, 1986, Tr. p. 29-32. Accordingly, these objections provide no obstacle to the confirmation of the Plan and are noted here only in an effort to be thorough.

j) And finally, the Equity Interests object to the confirmation of the Plan on the grounds that it is not fair and equitable.

5) A common shareholder, Action on Smoking and Health ("ASH") objects to confirmation of the Plan on the ground that the Debtor has, in failing to pursue alleged causes of action against cigarette manufacturers, failed to realize all available assets of the estate. ASH neither appeared, nor did it submit evidence in support of its objections at the hearing. Even were its bald assertions found credible, ASH failed to make any

cogent demonstration as to the real probability of any asset improvement.

B. Standing

Some of the Plan proponents have questioned the standing of each of the Objectors to raise *some* of the challenges to confirmation just enumerated. While § 1109 of the Bankruptcy Code states that "[a] party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter", recent, persuasive case law has limited the standing of parties in interest to object to plan confirmation on appeal. *See, e.g. In re Evans Products Co., et al.*, 65 B.R. 870, 874 (S.D.Fla.1986) ("Appellants have standing only to challenge those parts of a reorganization plan that affects their direct interests."), *and In re Fondiller*, 707 F.2d 441 (9th Cir.1983) (only "aggrieved persons" may *appeal* an order of the Bankruptcy Court), *and In re Sweetwater*, 57 B.R. 743, 746 (D.Utah 1985) ("This court interprets the 'aggrieved person' test to mean that an appellant who is appealing from a Bankruptcy Court order, confirming a plan of reorganization, may challenge only those parts of the plan that directly, adversely, and pecuniarily affect the appellant."); *and see Holywell Corp. v. Bank of New York*, 59 B.R. 340, 349 (S.D.Fla. 1986).

Under these cases only parties adversely affected by provisions of a plan may raise an

objection to confirmation based on such provisions, on appeal. Thus, no party may successfully prevent the confirmation of a plan by raising the rights of third parties who do not object to confirmation. Although these cases discuss the question of standing on *appeal*, they are instructive with respect to the question of standing in a contested confirmation hearing. The doctrine of standing serves to protect the adversarial system which constitutes the cornerstone of American judicial process. Pursuant to this system, courts generally will only hear the arguments of parties who have a direct stake in the consequences of a proceeding. Thus a party who is not directly "aggrieved" by the construction of a provision of the Plan would lack the requisite standing to be heard. Nonetheless, in order to ensure that the interests of all parties in this proceeding have been protected, and because an objection by objection standing evaluation would be wasteful and counterproductive, this court has considered all the objections raised, regardless of the standing of the proponent.

II The Injunction

The nature of and legal basis for the injunction sought by the Debtor in its Plan of Reorganization has provided the basis for many objections to confirmation. It is concededly a cornerstone of the Plan.

A. The Provisions of the Injunction

Article IX, ¶ 9.2A(3) of the Plan of Reorganization provides that this court shall "supplement

the injunctive provisions of § 524 of the Code, staying, restraining and enjoining all Persons and Governmental Units from taking one or more of the following actions for the purpose of, directly or indirectly, collecting, recovering or receiving payment of, on or with respect to any Claims, Interests or Other Asbestos Obligations [other than those provided for under the Plan]:"

The actions prohibited by this Injunction include: commencing, enforcing, perfecting, or setting-off any proceeding, judgment or interest against the Debtor or its subsidiaries or any settling insurance company, or any of their transferees, or against the Trust.

Article IX, ¶ 9.1 of the Plan states that "It shall be a condition precedent to the confirmation of this plan that on or prior to the confirmation date: (C) The court shall have entered: (5) an order barring the assertions of punitive damage claims by holders of Class 3 and Class 4 claims or by persons asserting other asbestos obligations."

Thus, the Injunction, effectively channels all asbestos related claims and obligations away from the reorganized entity and targets it towards the AH and PD Trusts for resolution. A feature of that resolution will be the unavailability of punitive damages awarded for the claimants.

B. The Objections to the Injunction

The Kane Objectors challenge the validity of the injunction as it applies to future claimants as well as the power of this court to issue the injunction and to disallow punitive damage claims. (Future claimants are persons "who have

been exposed to asbestos or asbestos products mined, manufactured or supplied by Manville [before the August 26, 1983 chapter 11 petition] and have manifested or will manifest disease post-petition and who are not otherwise represented in these proceedings." Order of August 14, 1984 Appointing Leon Silverman, Esq. Representative for Future Claimants.) The Equity Interests similarly challenge the Injunction as it applies to future claimants on due process grounds.

C. This Court has the Authority to Issue the Injunction

The Manville reorganization is "one of the most complicated and difficult bankruptcy reorganizations in history. . . ." *In re Johns-Manville Corp.*, 801 F.2d 60, 69 (2d Cir.1986) (Oakes, J., dissenting). Indeed, this case is also one of the most hard fought in reorganization annals. It has been estimated that there have been some 900 applications or motions, over 1000 orders, approximately 55 adversary proceedings, over 40 appeals (not including writs addressed to the U.S. Supreme Court), 300 odd hearings and thousands of pages of court transcripts.

Through it all, this court, this Debtor, and the parties in interest have had to address societal, legal and economic issues on a scale heretofore unknown to Title 11 proceedings. As regards the presiding over and participation in this case, all parties have been keenly aware that this court sits both as a court of equity and as one charged with fulfilling a legislative mandate. Therefore, this reorganization can only succeed meaning-

fully if the Plan protects the equitable rights of parties in interest such as the present and future AH claimants as well as the statutory rights of all parties in interest.

A bankrupty court sits as a court of equity. As such this court may issue injunctions when necessary to effectuate reorganizations. *Continental Illinois Nat. Bank and Trust Co. v. Chicago, Rock Island and Pacific Ry. Co.*, 294 U.S. 648, 55 S.Ct. 595, 79 L.Ed. 1110 (1935). This equitable power has been codified in § 105 of the Code and allows a bankruptcy court to enjoin proceedings in other courts to ensure the efficient administration of an estate, *see In re Johns-Manville Corp.*, 801 F.2d 60, 64 (2d Cir.1986) ("In our view if the Bankruptcy Court may ever use its equitable powers under § 105(a) to enjoin actions pursued in other courts as 'concerning the administration of the estate' under § 157(b)(2)(A), it may exercise that power where there is a basis for concluding that rehabilitation, the very purpose for the bankruptcy proceedings, might be undone by the other action."); *In re Equity Funding Corp. of America*, 396 F.Supp. 1266 (C.D.Cal.1975), *aff'd on other grounds*, 519 F.2d 1274 (9th Cir.1975); *In re Amber Lingerie, Inc.*, 30 B.R. 736, 737 (Bankr.S.D.N.Y.1983).

The effect of this equitable power is not limited to the pendency of a reorganization proceeding. Indeed, bankruptcy courts frequently issue injunctions that limit recourse against the debtor, far beyond the date of confirmation. *see, e.g., In re Abraham*, 421 F.2d 226, 227-28 (5th Cir.1970); *Gotkin v. Korn*, 182 F.2d 380, 382 (D.C.Cir.1950); *Reconstruction Finance Corp. v.*

Jacksonville Blow Pipe Company, 143 F.Supp. 601, 602-03 (N.D.Fla.1956), *aff'd*, 244 F.2d 394 (5th Cir.1957).

Injunctions which permit the sale of assets free and clear of third party interests, for example, typically channel the prosecution of those third party interests against the proceeds of the sale. This power to effectuate sales free and clear was recognized by the Supreme Court over 100 years ago. In *Ray v. Norseworthy*, the Court sanctioned such sales, and the channeling of third party claims, as long as the court rendered "to the parties interested their respective priorities in the proceeds" of the sale. 90 U.S. (23 Wall.) 128, 134 (1874).

Various Code sections, e.g. § 363(f) and (h), explicitly provide for the channeling of claims in this manner. The court's authority to channel claims is, however, by no means limited to such provisions. This authority is "granted by implication", even absent statutory provisions. *Van Huffel v. Harkelrode*, 284 U.S. 225, 227, 52 S.Ct. 115, 116, 76 L.Ed. 256 (1931); *and see Fierman v. Seward National Bank*, 37 F.2d 11, 13 (2d Cir.1930); *see also Farmers Bank v. Julian*, 383 F.2d 314, 322 (8th Cir.1967), *cert. denied*, 389 U.S. 1021, 88 S.Ct. 593, 19 L.Ed.2d 662 (1967); *Rubenstein v. Nourse*, 70 F.2d 482, 484 (8th Cir.1934); *In re Penn Central Transportation Co.*, 383 F.Supp. 1128, 1130 (E.D.Pa.1974).

This channeling authority has been appropriately used to limit the prosecution of a statutory claim against the debtor and to direct that claim to a particular property and the cash fund generated from its sale. *Forde v. Kee-Lox Mfg. Co.*,

Inc., 437 F.Supp. 631, 633 (W.D.N.Y.1977), *aff'd*, 584 F.2d 4, (2d Cir.1978); *see also*, *In re New England Fish Co.*, 19 B.R. 323 (Bankr.W.D.Wash. 1982). Furthermore, these channeling injunctions are inherently equitable, and not creatures unique to the bankruptcy courts. *See Texas v. Florida*, 306 U.S. 398, 405-06, 59 S.Ct. 563, 567-68, 83 L.Ed. 817 (1939); *State Farm Fire and Casualty Co. v. Tashire*, 386 U.S. 523, 87 S.Ct. 1199, 18 L.Ed.2d 270 (1967) *and see* Fed.R.Civ.P. 23(b)(1)(B).

The analogy to equitable channeling injunctions is quite compelling in this case. The Injunction sought under the Plan will preserve the rights of all asbestos claimants by establishing a corpus of funds from which all can collect. In the absence of the Injunction, the intended beneficiaries of the reorganization will certainly suffer. Furthermore, in the absence of the Injunction, one of the central purposes of Title 11, i.e. preventing the inequitable, piece-meal dismemberment of the debtor's estate, cannot be achieved. Therefore, this court finds that the Injunction contemplated by the Plan is well within its equitable and statutory authority.

D. The Injunction does not violate due process

The Equity Interests and Kane Objectors have also contended that the Injunction requested under the Plan is unconstitutional in that it would violate the due process rights of future claimants. The Injunction, it is asserted, will unconstitutionally bind future claimants to an

impairment of their rights without appropriate notice.

This court has long been aware of the delicate and difficult notice problems inherent in the Debtor's efforts to equitably resolve all of its asbestos-related liabilities. In its decision approving the appointment of the Legal Representative for Future Claimants, in January of 1984, the court noted:

> [T]he problem of sufficient notice of the impact of these proceedings on these putative claimants alluded to by the lower courts in *UNR* and *Amatex*, and raised by some of the movants herein, while difficult in the extreme, is a logistical one which can be handled by resort to innumerable media tools now availabe in our electronically aware society for use by the representative of future claimants.

In re Johns-Manville Corp., 36 B.R. 743, 754-55 n. 6, (Bankr.S.D.N.Y.1984), *aff'd*, 52 B.R. 940 (S.D.N.Y.1985).

Due process, of course, does not and has never, mandated personal, actual notice as the Objectors seem to suggest. The standard announced by the Supreme Court in *Mullane v. Central Hanover Bank and Trust Co.* requires notice "reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950). Indeed, in words that are particularly relevant here, the Court stated, "deprivation of life, liberty or property by

adjudication be proceeded by notice and opportunity for hearing *appropriate to the nature of the case.*" (Emphasis added) *Id.* at 313, 70 S.Ct. at 656.

On August 28, 1986 this court signed an order pursuant to which the Debtor undertook an extensive campaign designed to provide the maximum amount of publicity, with respect to the confirmation process of this Plan, that was reasonable to expect of man and media. That campaign provided, *inter alia,* for national television and radio advertisements, newspaper advertisements in the six leading U.S. and Canadian newspapers and in the largest circulation daily newspaper in each state, the District of Columbia and each Canadian province. This publicity campaign was designed to inform as many future asbestos claimants as possible of the impact of the Manville reorganization upon whatever rights they might have against the Debtor and give them a voice in these proceedings. Such a form of notice clearly meets the standard set forth in *Mullane* where notice by publication is constitutionally adequate "to those beneficiaries whose interests are either conjectural or future." *Mullane,* 339 U.S. at 317, 70 S.Ct. at 659. *See, also, City of New York v. New York, New Haven and Hartford Rail Company,* 344 U.S. 293, 296, 73 S.Ct. 299, 301, 97 L.Ed. 333 (1953).

In the present case, the Legal Representative for Future Claimants has been active in the Manville reorganization for over two years. He has been the catalyst for, if not the architect of this Plan. The Legal Representative was endowed upon his appointment with the full

panoply of statutory rights and duties of representation available to an official committee under the Code. *See, In re Johns-Manville Corp.*, 36 B.R. 743 (Bankr.S.D.N.Y.1984). As this court noted, upon the appointment of the Legal Representative, binding unknown parties in interest to the outcome of judicial procedures in which they have been represented by a trustee, legal representative or guardian *ad litem* acting as a fiduciary for their interests, is not a novel phenomenon in the law. *See, e.g. Hatch v. Riggs*, 361 F.2d 559 (D.C.Cir.1966).

Finally, it is worthwhile to remember who due process will serve in this reorganization. The goal of the Plan and the purpose of the Injunction is to preserve the rights and remedies of those parties, who by an accident of their disease cannot even speak in their own interest. The impracticable, if not impossible version of due process envisioned by the Objectors would effectively destroy these rights and remedies. Theories and standards of "due process" are nothing more than the human effort to make the inchoate notions of justice and equity real and tangible to parties who stand before a court of law. The Objectors' "due process", which would deny asbestos victims justice and equity, is not a "due process" at all.

E. This court may enjoin the award of punitive damages

The Kane Objectors also contend that the Injunction is flawed in that it would prohibit the recovery of punitive damages by asbestos victims. To allow recovery of punitive damages, of course, would be to risk the depletion of Trust assets to

the benefit of known victims at the expense of future claimants. Such a result is inequitable on its face.

The purpose of punitive damages, furthermore, is to punish tortfeasors and deter them from their wrongful conduct. *See, e.g., Williams v. City of New York,* 508 F.2d 356 (2d Cir.1974); *Sibley v. K.L.M. Royal Dutch Airlines,* 454 F.Supp. 425 (S.D.N.Y.1978). Neither purpose would be served by permitting the recovery of punitive damages in this reorganization. Punitive damages under the Plan would be recovered from the Trust. The Trust is not, by any stretch of the imagination, a target to be deterred from wrongful conduct. As noted above, recovery of punitive damages will deplete the Trust at the expense of future victims. These future victims are not merely innocent parties, but rather injured parties who are inexorably backing into the present as their dreaded asbestos diseases manifest themselves. Punitive damages in this context would visit a hardship on this group for wrongs attributable to others. Therefore the policy to be advanced by permitting such damages would not be furthered in this reorganization. *See, e.g., Sanford v. Celotex Corp.,* 598 F.Supp. 529, 530-31 (E.D.Tenn. 1984) ("[T]he unique nature of asbestos litigation necessitates care not to exhaust in a limited number of large punitive damage awards funds needed for possible compensatory awards in multiple asbestos lawsuits.").

Finally, it should be observed that arguably under § 510 of the Code, bankruptcy courts have the *statutory* power to subordinate claims for punitive damages. Bankruptcy courts have cer-

tainly exercised their inherent equitable authority to subordinate and to disallow punitive damage claims. "The idea is that to allow a claim for punitive damages in these circumstances would make innocent creditors bear the burden of the debtor's wrongdoing." *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 786 F.2d 794, 797 (7th Cir.1986); *and see, In re GAC Corp.*, 681 F.2d 1295, 1301 (11th Cir.1982) ("We agree with the bankruptcy judge that the effect of allowing a punitive damages claim would be to force innocent creditors to pay for the bankrupt's wrongdoing. Such a result would be inequitable, and the punitive damages claim was properly stricken.") Thus, whether or not punitive damages are recoverable in bankruptcy, it is well within the authority of this court to disallow a claim for punitive damages, in the circumstances of this case, where allowing such a claim would ill serve the policy of such awards. *See In re Colin*, 44 B.R. 806 (Bankr.S.D.N.Y.1984). Indeed, it is well within the equitable power granted by § 105 of the Code to preclude, by means of the Injunction, recovery of punitive damages in this reorganization.

III The Status of the Future Claimants

Several objections to confirmation revolve around the status of future asbestos victims and their claims in this reorganization. From the outset, it should be noted that in a very real sense, both from the point of view of the Debtor and from that of the asbestos victims, a distinction between "present" and "future" victims is, at best, nominal. The Trust does not make this

nominal distinction and is designed to satisfy the claims of all victims, whenever their disease manifests.

The future claimants are parties in interest, as defined by the Code, § 1109. *In re Johns-Manville Corp.*, 36 B.R. at 746; *and see, In re Amatex Corp.*, 755 F.2d 1034, 1041 (3rd Cir.1985) ("Whether or not future claimants have claims in the technical bankruptcy sense that can be affected by a reorganization plan, such individuals clearly have a practical stake in the outcome of the proceedings."); *accord, In re UNR Industries, Inc.*, 725 F.2d 1111 (7th Cir.1984).

Whether these parties in interest have claims that are cognizable in a reorganization proceeding, however, is not an issue which needs to be determined in order to confirm this Plan. Instead, the Plan treats the claims as "other asbestos obligations" ("OAO"), to be funneled into the same claims handling facility which administers the claims of present asbestos victims. OAO's will not be discharged upon confirmation. Instead they will be subject to the Injunction.

Although the definition of "claim" in § 101(4) of the Code is meant to be construed liberally, *see In re Johns-Manville Corp.*, 57 B.R. 680 (Bankr.S.D.N.Y.1986); *In re Robinson*, 776 F.2d 30, 35 (2d Cir.1985), *rev'd on other grounds*, 479 U.S. 36, 107 S.Ct. 353, 93 L.Ed.2d 216 (1986) (Reviewing the relevant case law on the definition of claim, the court noted the following characterizations: "broad", "very broad", "extremely broad", "could not be broader", "broadest possible", "all-encompassing", "sufficiently broad to cover any possible obligation"), two recent Third

Circuit cases have, nevertheless, adopted a more limited construction of the term. *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936 (3d Cir.1985), *cert. denied*, 474 U.S. 864, 106 S.Ct. 183, 88 L.Ed.2d 152 (1985); *In re M. Frenville Co., Inc.*, 744 F.2d 332 (3d Cir.1984), *cert. denied*, 469 U.S. 1160, 105 S.Ct. 911, 83 L.Ed.2d 925 (1985).

Under *Schweitzer*, the determination of whether a claim exists turns on relevant state or federal non-bankruptcy law. Thus, in an Act case, where the Federal Employee Liability Act applied, a plaintiff exposed to asbestos prior to confirmation, but who did not manifest an asbestos-related disease until after confirmation, did not have a claim dischargeable upon confirmation. Similarly, in *Frenville*, where a cause of action did not arise until after the filing of a petition, although the underlying acts occurred prepetition, the plaintiff was held not to have a claim dischargeable in bankruptcy.

It should be noted, however, that both *Schweitzer* and *Frenville* explicitly questioned the applicability of their holdings as they might apply in cases similar to the one before this court. The *Frenville* court commented:

> "If there were some overriding federal policy, we might have the power to develop federal law. *See, In re Beck Indus., Inc.*, 725 F.2d 880, 891 (2d Cir.1984); *In re Johns-Manville Corp.*, 36 B.R. 743, 751 n. 4 (Bankr.S.D.N.Y), *appeal denied*, 39 B.R. 234 (S.D.N.Y.1984). A bankruptcy proceeding stemming from a mass tort—such as expo-

> sure to asbestos—may be a case in which the application of federal law is indicated."

744 F.2d 332, 337 n. 8 (3d Cir.1984); *and see, Schweitzer,* 758 F.2d at 944, n. 1.

Other courts confronted with the issue of future claims have contemplated a more inclusive definition of claim. The Seventh Circuit, in *UNR, supra,* for example stated that:

> A bankruptcy court's equitable powers . . . just might be broad enough to enable the court to make provision for future asbestosis claims against the bankrupt when it approved the final plan of reorganization . . . . Could it not be argued therefore that a bankruptcy court can and should use its equitable powers, which traditionally "have been invoked to the end that . . . substance will not give way to form, that technical considerations will not prevent substantial justice from being done,". . . to prevent the liquidation or discharge of the bankrupt before provision is made for such persons?

725 F.2d at 1119 (citations omitted).

The court in *In re A.H. Robins Co, Inc.*, similarly was reluctant to adopt a *Frenville* construction where such construction would disadvantage future claimants.

> If federal law were not created in this case, Robins could be subject to an ongoing battle with Dalkon Shield cases and would have to defend piece-meal litigation, which technically, if allowed, could be interpreted to fall outside the reorganization umbrella. This is

> just the type of chaos the drafters of the Code sought to avoid when they abandoned the concept of "provability" and "allowability" which was rooted in [the] old Act, and adopted, in its place, the more broad, and liberal definition of the term "claim" as presently found in the Code.

63 B.R. 986, 992 (Bankr.E.D.Va.1986).

The court in *In re Baldwin United Corp.*, was similarly critical of the *Frenville* decision.

> While the third-party cause of action of the accounting firm in *Frenville* may not have arisen under New York state law until *after* the petition was filed, its claim for bankruptcy purposes arose *before* the petition was filed. This is so because a "right to payment" under the definition of "claim" includes obligations which are neither matured, nor liquidated, nor fixed. 11 U.S.C. § 101(4)(A).

48 B.R. 901, 903 (Bankr.S.D.Ohio 1985). *See also, In re Edge*, 60 B.R. 690, 704 (Bankr.M.D.Tenn. 1986) *and In re Johns-Manville*, 57 B.R. 680, 689 (Bankr.S.D.N.Y.1986) ("It [the *Frenville* analysis] creates an artificial and arbitrary classification system by which the timing of a third-party lawsuit against the claimant determines not only the priority of distribution on a claim but also the dischargeability of the claim.")

Thus, were this court compelled to decide whether to distinguish between victims solely on the fortuitous basis of the time of manifestation of their diseases, this latter authority would,

indeed, be an imperative. As noted before, however, there is no need to reach this issue.

IV Standards for Confirmation Under § 1129

Courts may confirm a plan under § 1129, only if all the requirements of this section are met. One of the requirements of § 1129(a) is that each class of claims or interests either accept the plan or not be impaired by the plan. If, as in the present case, an impaired class does not accept the plan, the plan may still be confirmed pursuant to § 1129(b) ("cram down"). The plan, however, must also comply with all other provisions of § 1129(a).

A. Standards for Confirmation Under § 1129(a)

§ 1129(a) provides that "the court shall confirm a plan only if all of the following requirements are met":

(1) "the plan complies with the applicable provisions of this title".

Objections to confirmation raised under § 1129(a)(1) generally involve the failure of a plan to conform to the requirements of § 1122(a) or § 1123. § 1122(a) provides for the appropriate classification of claims. In the present case, claims against the Debtor are appropriately classified and no objections to their classification have been raised.

§ 1123(a) additionally provides that a plan must (1) designate the classes of claims against the debtor. Classes of claims and interests are appropriately designated in Article II of the

Debtor's Plan, pursuant to this requirement. § 1123(a)(2) provides that the plan of reorganization must specify classes which are unimpaired under the plan. Classes 1, 2 and 5 are appropriately designated as unimpaired in Article III of the Debtor's Plan, pursuant to this requirement. § 1123(a)(3) provides that treatment of impaired classes must be described in the plan. Article III of the Debtor's Plan also, appropriately describes the treatment of impaired classes, pursuant to this requirement. § 1123(a)(4) provides that all members of a particular class must be treated equally, unless a given member consents to less favorable treatment of his or her claim or interest. The Debtor's Plan, pursuant to this requirement provides for the equal treatment of each member of each particular class.

§ 1123(a)(5) requires that a plan provide adequate means for that plan's implementation. Article V of the Debtor's Plan satisfies this requirement. § 1123(a)(6) prohibits the issuance of non-voting equity securities by the reorganized debtor and ensures the appropriate distribution of voting power among the various classes of security interests. Paragraph 11.2 of Article XI of the Debtor's Plan provides for compliance with this requirement. § 1123(a)(7) provides that the method for appointing officers, directors or trustees under the plan comply with the interests of creditors, equity security holders and with public policy. The methods of appointment set forth in the Debtor's Plan comport with these requirements. Thus the Plan is acceptably structured under § 1122 and § 1123 and pass muster for the purposes of the § 1129(a)(1) requirement.

(2) "The proponent of the plan complies with the applicable provisions of this title."

Objections to confirmation raised under § 1129(a)(2) generally involve the alleged failure of the plan proponent to comply with § 1125 and § 1126 of the Code. *See, In re Butler*, 42 B.R. 777 (Bankr.E.D.Ark.1984); *In re Toy & Sports Warehouse*, 37 B.R. 141, 149 (Bankr.S.D.N.Y.1984). These sections provide for the appropriate manner of disclosure and solicitation of plan votes. In the present case, the Equity Interests have alleged that the Debtor's Disclosure Statement was misleading, in that it failed to apprise creditors and security holders that the Second Circuit reversed and remanded this court's decision of August 1985 enjoining the calling of a shareholder's meeting. The Kane Objectors allege that the Debtor's Disclosure Statement was misleading in that it failed to adequately inform creditors and shareholders of a) alleged legal infirmities with respect to the Injunction; b) the number of claims to be satisfied from the AH Trust; c) the alleged legal infirmity of plan provisions providing for payments to future claimants; and d) the alleged legal infirmities of the special voting procedures adopted for AH claimants.

Contrary to the objections of the Equity Interests, the Disclosure Statement was not flawed by its failure to report the decision of the Second Circuit reversing and remanding for further proceedings the August 1985 decision of this court that enjoined the call of a meeting of the Debtor's shareholders. This court approved the Disclosure

Statement on August 28, 1986. The Second Circuit's non-finally dispositive decision issued on September 10, 1986, after the Plan and Disclosure Statement had been disseminated and the voting process begun. Failure to report the Second Circuit's decision did not prejudice the interest of any party involved in these proceedings. On remand, this court, following an exhaustive hearing, decided, on October 28, 1986, to enjoin the efforts to call a shareholders meeting. No suggestion has been made that this too is a disclosure event. Furthermore, the standard implicit in the objection of the Equity Interests would have been impossible for any plan proponent to meet, in light of the sheer volume of appellate activity generated by these same Interests subsequent to the approval of the Disclosure Statement. The Code simply does not require disclosure of every interlocutory or non-final decision in a case to meet the standards of § 1125. It was never intended that a disclosure statement be a daily, weekly or periodical litigation newsletter.

As discussed, the Kane Group's objection to the Disclosure Statement for its alleged failure to adequately describe the legal infirmities of the Injunction is without merit. The Debtor's Disclosure Statement adequately describes the parameters and legal sufficiency of the injunction. Similarly the objections of the Kane Group based upon the alleged failure of the Disclosure Statement to adequately describe the impropriety of payments to future claimants under the Plan, are without merit. The status of the future

claimants in this case has already been discussed.

The Kane Objectors' challenge to the disclosure statement, based on its description of the number of claims to be paid by the AH Trust must also fail. No estimation as to the number of claimants or amount of claims to be paid can be made with absolute certainty. The debtor can only be required to make estimates which are reasonable. The evidence presented has adequately demonstrated the reasonableness of these estimates. Testimony established a floor of at least 50,000 in number of present claimants. They have become identifiable through the confirmation process. Furthermore, a $26,000 per claim disposition value estimate is amply supported by the empirical data relied upon. No rebuttal evidence was offered to cast doubt on these assumptions.

The Kane Objectors also challenge the legal adequacy of the voting procedures adopted for the AH claimants. On June 23, 1986 this court entered an order fixing, for the purposes of voting, the amount of each AH claim at one dollar. Acceptance by the AH class was conditioned upon acceptance by not less than 2/3 in number of the holders of such claims who voted on the Plan. Over 50,000 AH claimants voted, and with 3,000 ballots yet to be counted, *approximately 95%* of this class has accepted the Plan.

The basis of the Kane Objectors to this voting procedure is that it does not rigidly comply with §§ 501, 502 and 1126 of the Code. These objections ignore both the realities of this case, and the equities which need to be addressed there-

under. Furthermore, Fed.R.Bankr.P. 3018, specifically and elastically provides that a court may, for the purposes of voting, temporarily allow a claim or interest "in an amount which the court deems proper". The effect of the voting procedures adopted for AH claimants in this case has been to enfranchise the greatest possible number of asbestos health victims. The unstated goal of the Kane Objectors, on the other hand, would seem to be to silence the vast majority of those parties in interest who are the central concern of this reorganization and who apparently do not share the Objectors' negative view of the Plan solutions.

It has been the stated goal of this court and of the parties in interest throughout these proceedings to ensure the protection and participation of the interests of the asbestos health victims, *see e.g., In re Johns-Manville Corp.*, 66 B.R. 517, 522 (Bankr.S.D.N.Y.1986). The construct of the voting procedure is proper as it clearly meets the desideratum of expanded sufferage and participation in the reorganization by all parties in interest.

(3) "The Plan has been proposed in good faith and not by any means forbidden by law."

In considering whether a plan has been filed in good faith a court must determine "in light of the particular facts and circumstances, whether the plan will fairly achieve a result consistent with the Bankruptcy Code." *In re Madison Hotel Associates*, 749 F.2d 410, 425 (7th Cir.1984). The Second Circuit has defined the good faith standard in the bankruptcy context "as requiring a show-

ing that the plan was proposed with 'honesty and good intentions' and with 'a basis for expecting that a reorganization can be effected'." *In re Koelbl*, 751 F.2d 137, 139 (2d Cir.1984).

The Equity Interests have alleged that the Debtor has acted in bad faith in negotiating the Plan, and that, therefore, the Plan cannot satisfy this requirement of the Code. This court, however, recently held to the contrary. The court, indeed, found that the parties in interest negotiated with Equity Interests in good faith, and that any failure of the negotiations from Equity's point of view was properly attributed to Equity's refusal to negotiate from the Plan. *In re Johns-Manville Corp.*, 66 B.R. 517, 531-32, 540-41 (Bankr.S.D.N.Y.1986), *aff'd mem.*, (S.D.N.Y. December 9, 1986).

The Kane Objectors contend that the Plan was proposed in bad faith, in that the Debtor sought, by its chapter 11 filing, to orchestrate nationwide asbestos-related litigation. The argument is bereft of merit. This court has already passed upon the reasons for and propriety of the Debtor's chapter 11 filing. *In re Johns-Manville Corp.*, 36 B.R. 727 (Bankr.S.D.N.Y.1984), *appeal denied*, 39 B.R. 234 (S.D.N.Y.1984), *reh'g denied*, 39 B.R. 998 (S.D.N.Y.1984), *mandamus denied*, 749 F.2d 3 (2d Cir.1985). Johns-Manville was and remains "a financially besieged enterprise in desperate need of reorganization of its crushing real debt, both present and future." *Id* at 741.

(4) "Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan,

for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable."

The evidence establishes that all relevant payments contemplated by this section have been or will be made subject to the approval of this court.

The Equity Interests and Mr. MacLean would read this section to require this court to pass on fees, paid to attorneys representing asbestos health claimants, by their clients. These objectors, however, have cited no authority, which even by analogy, would support their interpretation of § 1129(a)(4). Furthermore, in connection with a contested matter, this court has already ruled that fee arrangements between AH claimants and their attorneys lie beyond the jurisdiction of the court:

> [T]he reasonableness of the contingency fee arrangement between individual creditors and their counsel does not affect the particular parties before me today [The Equity and Commercial Creditors Committees]. The Equity Committee may have and the Commercial Committee may have a legitimate opinion or opinions as to the general appropriateness of contingent fees, but they have no clear financial stake in the individual contracts that they question.

Transcript of Hearing on Motion for Court Review of Contingent Fees of Counsel for Asbestos Personal Injury Claimants, February

25, 1986, p. 76; *and see, Brown v. Watkins Motor Lines, Inc.*, 596 F.2d 129 (5th Cir.1979).

The objectors here seek to raise a putative controversy between third parties, the merits of which may very well be subject to judicial determination at a later time and place, but which does not effect the administration of the Debtor's estate. The fee arrangement between a claimant and his or her attorney is immaterial to these reorganization proceedings. As such, these objections raise collateral disputes which this court is not empowered to rule upon. *See In re Paso Del Norte Oil Co.*, 755 F.2d 421 (5th Cir.1985), *In re Shirley Duke Associates*, 611 F.2d 15 (2d Cir.1979), *First State Bank & Trust Co. v. Sand Springs State Bank of Oklahoma*, 528 F.2d 350 (10th Cir.1976). Nothing stated herein should be construed as expressing approval or disapproval of individual contingent fee arrangements reached in a non-bankruptcy setting.

(5) Identities, affiliations and compensation of individuals proposed to serve as officers and directors of the debtors and individuals proposed to serve as trustees of the AH Trust and the Property Damage Trust have been disclosed and such appointments are consistent with the interests of creditors, equity security holders and public policy.

The Debtor has made detailed disclosures, pursuant to § 1129(a)(5) both in its Disclosure Statement and at the Hearing on Substantive Consolidation, December 9, 1986. The court also notes that no objections to confirmation have been raised under this section.

(6) "Any governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval."

Because the Debtor is a widely diversified international company, the usual declaration of "non applicability of this section" was insufficient. In the instant case, witness testimony demonstrated that the Debtor is not subject to any regulatory rate governance commission.

§ 1129(a)(7) reads in relevant part "With respect to each impaired class of claims or interests— each holder of a claim or interest of such class —(i) has accepted the plan or (ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date."

In the present case, acceptance of the plan by impaired classes has not been unanimous. The Debtor's Plan, therefore, must provide each holder of a claim or interest with an amount equal to or greater than the amount he or she would receive under chapter 7, in order to comply with this section of the Code. The Property Damage Claimants, AH Claimants, Unsecured Creditors, Preferred Shareholders and Common Shareholders are all impaired classes under the Debtor's Plan. The Debtor has presented convincing evidence both in its Disclosure Statement

and at this hearing, establishing that each member of these impaired classes will receive more under this Plan, than they would upon liquidation of the Debtor.

As demonstrated by the Debtor's Liquidation Analysis, Exhibit 3, which was testified to by Mr. Thomas Stevens, President and Chief Executive Officer of the Manville Corporation, Transcript of Confirmation Hearing dated December 16, 1986 ("Tr."), p. 94 et seq, and by the Debtor's Value of Distribution to Classes 6 and 7, Exhibit 9, testified to by Mr. Byron Rose, Managing Director of Morgan Stanley, the Debtor's investment bankers, Tr. p. 190 *et seq.*, upon liquidation, each class of impaired claims or interests treated in this Plan would receive less than what the Plan itself provides for.

The Liquidation Value, Exhibit 6, testified to by Mr. Rose, Tr. 159, describes the assumptions and estimations made by the Debtor and its investment bankers in arriving at a liquidation value for the Manville corporation. This analysis assumed: 1) that the Debtor's businesses would be sold on a going concern basis; 2) that some sort of Injunction would protect the transferee entity; and that 3) the gross operating value of the business sold would suffer a 25% discount in the transaction. This discount reflects the risk perceived by the market in the Debtors asbestos and environmental liabilities and the loss in value associated with a forced sale. The court finds these assumptions to be quite reasonable.

Class 3, the Property Damage Claimants are considered to have an allowed claim of $125 million (based upon a negotiated compromise of

more than $80 billion in filed claims and a willingness to subordinate that interest to the AH victims). Upon liquidation, these claimants would receive between 56% and 81% of their allowed claims. The Plan provides for 100% of their claims. Tr. p. 110.

Class 4, the present Asbestos Health claimants have between $1.3 and $1.5 billion dollars in allowed claims. Upon liquidation, these claimants would again receive between 56% and 81% of their allowed claims. The Plan provides for 100% of their claims. Tr. p. 110.

Class 6, the General Unsecured Creditors, have an allowed claim of $472.5 million. They, too would receive between 56% and 81% of their claims on liquidation. The Plan provides for 100% of their claims. Tr. p. 110. Unlike the claimants in Classes 3 and 4, who will receive cash under the Plan, Class 6 claimants will receive a combination of cash and notes in payment of their claims. This package is reasonably estimated to equal 100% of their claims. Class 6 will also receive a package of securities valued between $84 and $126.1 million in lieu of post-petition interest. Tr. p. 191 *et seq*. This payment will be discussed more fully hereafter.

Class 7, Preferred Shareholders, have allowed claims (liquidating preference) of $413 million. Upon liquidation, members of this class would receive nothing for their interests. Under the Plan, Preferred Shareholders will receive a package of securities with an estimated trading value of $79 to $94 million. Tr. p. 110. The value of this package, as the value of the securities package received by Class 6 claimants, is of course a func-

tion of the trading price of the reorganized corporation's securities. The actual payment received by these classes, under the Plan, therefore, may fluctuate. Tr. p. 188. The court finds that the range of value estimated by the Debtor is reasonable.

Class 8, the common shareholders, do not have an allowed claim. Upon liquidation, the members of this class would receive nothing. As will be discussed hereafter the Debtor is insolvent and therefore there is no residual value remaining for Equity. Under the Plan, however, Equity will retain a share of the reorganized corporation the value of which the Debtor estimates at $15 to $18 million dollars. Tr. p. 110.

The Equity Interests have challenged the Debtor's liquidation analysis on the ground that it improperly includes payments to future claimants. As will be shown, this contention is unfounded.

(8) "With respect to each class of claims or interests—(A) such class has accepted the plan or (B) such class is not impaired under the plan."

In the present case, only one impaired class, the common equity holders, has not accepted the Plan. The Debtor, therefore, can only confirm its Plan of Reorganization if it meets the requirements of § 1129(b) as well as those of § 1129(a). The § 1129(b) requirements will be discussed hereafter. The Kane Objectors have suggested that the acceptance voted by the AH Claimants is invalid in light of the voting procedures adopted for that class. As previously discussed, this objection is without merit.

§ 1129(a)(9) provides for the appropriate treatment of various priority claims arising under § 507.

The Debtor has established by convincing evidence that this provision has been satisfied. Furthermore, no objection to confirmation has been raised under this section.

(10) "If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider."

As previously noted, all impaired classes, with the exception of the common equity shareholders have accepted the Debtor's Plan. The provisions of this section have, therefore, been complied with.

(11) "Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan."

The Debtor has established by convincing evidence the feasibility of this Plan. Indeed, the troubled history of the Manville reorganization suggeststhat this Plan is the *most* feasible plan of reorganization that any party in interest could propose. *See, e.g., In re Johns-Manville Corp.*, 66 B.R. 517 (Bankr.S.D.N.Y.1986), *aff'd mem.*, (S.D.N.Y. December 9, 1986).

A Bankruptcy Court, in determining the feasibility of a proposed plan of reorganization should

"scrutinize the plan carefully to determine whether it offers a reasonable prospect of success and is workable." *In re Monnier Brothers*, 755 F.2d 1336, 1341 (8th Cir.1985). The plan proponent is not required to *guarantee* the ultimate success of the reorganized company. *Id; In re Wolf*, 61 B.R. 1010, 1011 (Bankr.N.D.Iowa 1986). Rather, the plan proponent is only required to provide a "reasonable assurance of success". *In re Trail's End Lodge, Inc.*, 54 B.R. 898, 904 (Bankr.D.Vt.1985).

Manville has demonstrated at this hearing that it will, upon confirmation, be able to meet its cash distribution obligations under the Plan. Furthermore, the Debtor's reasonable and credible projections of future earnings have established that the reorganized corporation is unlikely to face future proceedings under this title.

As demonstrated in its Feasibility Analysis, Ex. 4, p. 18-19, and testified to by Mr. Stevens, Tr. p. 113 *et seq.*, Manville will generate enough cash to meet its Plan obligations and operating cash requirements, from its own operations and from a pending credit facility over the next five years. Tr. p. 130-36. The court is satisfied that the assumptions and estimations underlying this analysis are well founded. Similarly the projected balance sheets and cash flow statements presented by the Debtor, Ex. 4, p. 18-21, testified to by Mr. Stevens, Tr. p. 130 *et seq.* reveal a corporation which this court can be "reasonably assured" will succeed in its business environment for the foreseeable future and which is unlikely to face reorganization or liquidation in that time

period. Seasoned, experienced, operating management remain with this Fortune 500 company to provide a measure of additional post-confirmation stability.

The Kane Objectors and Equity Interests have contended that the present Plan is not feasible by again asserting a perceived legal infirmity grounded upon the accommadations made for future claimants. This contention is not well founded, as has been demonstrated. The Armstrong and Kane Objectors have challenged the feasibility of the Plan on the ground that the AH Trust will be unable to satisfy present and future AH claims. The evidence submitted by the Debtor as previously noted, provides a reasonable estimation, based upon known present claimants and reasonable extrapolations from past experience and epidemiological data, of the number and amount of asbestos-related claims that the AH Trust will be required to satisfy. The Debtor has also established that the Trust will, in fact, meet this burden. As has been shown, objections based on the status of future claimants and the dischargeability of their claims in this reorganization are not a relevant issue in this confirmation proceeding.

The Armstrong Objectors have questioned the feasibility of the Debtor's Plan on the ground that Plan provisions which allegedly preclude the Trust from joining an industry wide claims handling facility, *i.e.* the Wellington Facility, will result in the rapid depletion of Trust assets to the detriment of Trust beneficiaries. The Plan, however, clearly provides that the trustees, in accordance with their fiduciary obligations, may

merge the Trust with another claims handling facility. The Armstrong objection is unsupported by factual data to demonstrate compatibility of the Trust facility with the Wellington facility or how a fruitful synergism would result by merger. Counsel for the objectant candidly admitted that the existence of separate facilities could affect Wellington settlements. These competitive concerns do not remotely affect feasibility.

Therefore, based on these findings, this court concludes, that with the exception of the provision of § 1129(a)(8) all requirements of § 1129(a) have been satisfied.

B. Standards for Confirmation Under § 1129(b)

§ 1129(b) of the Code provides that "Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph.

(1) "If the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan."

As noted previously, Classes 1, 2 and 5 are not impaired by the Debtor's Plan. Classes 3, 4, 6, 7, 8 and 9 are impaired under the Plan. Class 8, the common shareholders, is the only class which voted to reject the Plan.

The language and legislative history of the statute provides little guidance in applying the "unfair discrimination" standard of § 1129(b)(1). Generally speaking, this standard ensures that a dissenting class will receive relative value equal to the value given to all other similarly situated classes. Weintraub and Resnick, *Bankruptcy Law Manual*, ¶ 8.23[3] at p. 8-109-110 (revised ed. 1986); Klee, "All You Ever Wanted to Know About Cram Down Under the New Bankruptcy Code,"53 Am.Bankr.L.J. 133, 142 (1979). Thus a plan proponent may not segregate two similar claims or groups of claims into separate classes and provide disparate treatment for those classes. *See, e.g. In re Pine Lake Village Apartment Co.*, 19 B.R. 819 (Bankr.S.D.N.Y.1982); *compare In re Jartran, Inc.*, 44 B.R. 331 (Bankr.N.D.Ill.1984) (no unfair discrimination where separate classes receiving disparate treatment do not have comparable claims.)

In the present case, the interests of the Class 8 common shareholders are not similar or comparable to those of any other class. Thus, this court finds no unfair discrimination.

The applicable portion of § 1129(b)(2) provides: "For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements: (C) With respect to a class of interests:"

(i) "the plan provides that each holder of an interest of such class receive or retain on account of such interest property of a value, as of the effective date of the plan, equal to the greatest of the allowed amount of any fixed liquidation prefer-

ence to which such holder is entitled, any fixed redemption price to which such holder is entitled, or the value of such interest;"

It should be noted that § 1129(b)(2)(C), by it terms, is not exclusive. Indeed a court may and should take additional factors into consideration in determining whether a plan is fair and equitable with respect to a dissenting class. *See, e.g., In re Jones,* 32 B.R. 951, 960 n. 14 (Bankr.D.Utah 1983) (" 'Fair and equitable' is a term of art which carries with it decades of judicial interpretation. . . . Congress clearly intended to transfer some of the judicial gloss placed on the fair and equitable test under former law into the fair and equitable test under § 1129(b). 124 Cong.Rec.H. 11,103 (September 28, 1978); S. 17,420 (October 6, 1978).")

A valuation of the debtor's business is, by virtue of the statutory language, almost a prerequisite to a determination that a plan satisfies the fair and equitable test of § 1129(b). Manville has clearly established, by credible evidence, that its debt exceeds even the best estimate of its "going concern" value. As a result, the post confirmation value of Equity's interest is zero.

Manville has reasonably estimated the gross value of its operating business to be between $1.6 and $2.0 billion dollars, on a discounted cash flow basis. *See,* Exhibit 6 *and* testimony of Mr. Rose, Tr. 159 *et seq.* This value was discounted to reflect the market's perception of the corporation's environmental and asbestos liabilities. As reflected in the Market Value Adjusted Balance Sheet, Ex. 7, testified to by Mr. Rose, Tr. 174 *et*

seq., the value of the assets of the corporation in chapter 11 are significantly exceeded by its liabilities, currently estimated to range between $2.6 and $4.2 billion dollars. As a result, the common equity residual value ranges between *negative* $2.2 billion and *negative* $331 million. Tr. p. 182-83. The corporation is insolvent.

As has been fully explained, this court need not determine whether future asbestos-related liability is more appropriately treated as a current debt of the estate or as a liability of the post confirmation entity. It is beyond peradventure that there will be future claimants with rights to payment for their asbestos-related injuries. As the Debtor has established, whether those payments come from the Debtor's estate or from the post-confirmation entity, future asbestos-related liability has a significant impact on the Debtor's liquidation and going concern valuation. Assuming *arguendo*, that these rights to payments are "claims", as defined by the Bankruptcy Code, they would constitute a portion of Manville's plan debt, to be subtracted from the Debtor's going concern value. The result would be no value left for equity. Alternatively, if these rights to payment are not "claims" as defined by the Code, and they are obligations that the reorganized Debtor will be required to satisfy, the going concern value of the reorganized Debtor would suffer a concomitant decrease in value. Under either scenario, the value available to Equity is zero.

Finally, the Kane Objectors and Equity Interests assert that the provisions of the Plan that give effect to the settlement of Class 6 claims reached between the Debtor, Unsecured Credi-

tors and every consenting constituency, violate the fair and equitable requirements of § 1129(b). Under this settlement Class 6 members will receive approximately 50% of their allowed claims on confirmation, and notes representing the remainder of their claims, payable some years after confirmation. Class 6 claimants, under this agreement, will also receive a package of securities in the reorganized corporation in lieu of post-petition interest on their claims. This package has an estimated market value substantially less than the calculable post-petition interest on their claims.

The Equity Interests contend that Class 6 claimants may not receive post-petition interest on their claims, under § 502(b)(2) and § 506(b). Furthermore, Equity argues, that to the extent that Class 6 creditors are receiving property in lieu of post-petition interest, they are receiving property which otherwise would inure to the benefit of common shareholders.

Nowhere does the Code prohibit payment of post-petition interest under a plan in a chapter 11 reorganization. The Equity Interests' reliance on §§ 502 and 506, moreover, is misplaced. Equity apparently understands § 506 to provide the *sole* circumstances in which a creditor may receive post-petition interest under the Code. The genius of the Bankruptcy Code lies in its breadth and flexibility. This court is more than reluctant to read exclusivity into a particular section of a statute, where such exclusivity is not explicitly provided for, and such a reading does not comport with the spirit of the statutory scheme.

Furthermore, this court fails to see the relevance of § 502 to Equity's objection. § 502 is a provision which addresses the allowability of contested claims. Under § 502(b)(2), a bankruptcy court must disallow that portion of a disputed claim which represents post-petition interest, after a hearing on the contested matter. The Plan provisions which provide property in lieu of post-petition interest, in contrast, represent a settlement of the claims of unsecured creditors reached among the parties. (The $472 million figure is a negotiated assumption.) The Class 6 agreement is simply not a contested matter under § 502. Indeed, the more appropriate analogy would be to Fed.R.Bankr.P. 9019, which authorizes a bankruptcy court to approve compromises and settlements.

In any event, even were Equity's reliance on these inapplicable code sections justified, the property paid in lieu of post-petition interest, would never inure to the benefit of common shareholders. At the very least, this property would be consumed in satisfying the claims of preferred shareholders, a class superior on the ladder of "absolute priorities" to common equity. *see, In re Evans Products Co.*, 65 B.R. 870, 875 (S.D.Fla.1986) ("Appellants [the shareholders committee and the debtors, objecting to the confirmation of a creditor's plan] argue that the Grossman Guarantee claim is worth $61.3 million rather than the $86.4 million claimed by the Lenders [the plan proponents]. If true, the Lenders would receive more than 100% of their claim. This would violate the 'fair and equitable' requirement of § 1129(b)(1). The Appellants

again have no standing to raise this issue because the amount the Lenders are to receive under the Grossman Guarantee claim is an accommodation made among the creditors. Only the creditors rights *vis-a-vis* each other would be affected-Appellants inability to participate would not be changed under the absolute priority rule. . . .")

The Kane Objectors also contend that the provisions of the Plan whereby Class 6 creditors receive property in lieu of post-petition interest violate § 1129(b) and § 1129(a)(7) of the Code. The latter section requires that dissenting members of an impaired class receive "at least the value their claim would have received upon the debtor's liquidation." As noted above, the liquidation value of Class 4 claims is significantly less than the full value of their claims that they will receive under this Plan.

There is serious doubt as to the appropriateness of measuring the treatment of Class 4 claims under the fair and equitable standards of § 1129(b). Under § 1129(b)(1), a "cram down" may be effected "if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under *and* has not accepted, the Plan." 11 U.S.C. 1129(b)(1) (emphasis added). While Class 4 is impaired under this Plan, it has also voted overwhelmingly to accept the Plan. As noted in this section's legislative history: "It must be emphasized that the fair and equitable requirement applies *only to dissenting classes.* Therefore, unlike the fair and equitable rule contained in Chapter X and § 77 of the Bankruptcy

Act, under § 1129(b)(2) senior accepting classes are permitted to give up value to junior classes as long as no dissenting, intervening class receives less than the amount of its claim in full." 124 Cong.Rec. S17420 (daily ed. Oct. 6, 1978) (Remarks of Sen DeConcini) (emphasis added).

The agreement reached between Class 6 creditors and the other constituencies seems well within the contemplation of the Code. Here, all impaired classes senior to the unsecured creditors mutually agreed to a distribution of value available to creditors. In the words of the legislative history, they consented to "give up" value to which they had a right, in order to achieve a consensual plan.

Finally, it should be noted, that those asbestos health victims who have claims which are truly comparable to Class 6 claimants, i.e. liquidated, will receive post-petition interest on their claims, where permitted under applicable state law, under the Plan. Tr. p. 273-74.

V Conclusion

In conclusion, Manville has established by convincing evidence, that the Plan is fair and equitable in accordance with the requirements of § 1129(b). The Debtor is insolvent and no value remains for common equity. No class of interests junior to common equity shall receive property of the estate. Distribution under the Plan to classes senior to common equity is exceeded by the aggregate value of the claims of those classes. The objections to confirmation are denied.

The foregoing constitutes findings of facts and conclusions of law under Fed.R.Bankr.P. 7052. The Debtor is hereby ordered to submit an order of confirmation and all necessary implementing orders required pursuant to the Plan.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In Proceedings For A Reorganization
Under Chapter 11.
Case Nos. 82 B 11656,
82 B 11657, 82 B 11660,
82 B 11661, 82 B 11665 Through
82 B 11673 Inclusive,
82 B 11675, 82 B 11676 (BRL)

Filed December 22, 1986

In re

JOHNS-MANVILLE CORPORATION,
MANVILLE CORPORATION,
MANVILLE INTERNATIONAL CORPORATION,
MANVILLE EXPORT CORPORATION,
JOHNS-MANVILLE INTERNATIONAL
CORPORATION,
MANVILLE SALES CORPORATION,
f/k/a JOHNS-MANVILLE SALES CORPORATION,
successor by merger to MANVILLE BUILDINGS
MATERIALS CORPORATION, MANVILLE
PRODUCTS CORPORATION and MANVILLE
SERVICE CORPORATION,
MANVILLE INTERNATIONAL CANADA, INC.,
MANVILLE CANADA, INC.,
MANVILLE INVESTMENT CORPORATION,
MANVILLE PROPERTIES CORPORATION,

ALLAN-DEANE CORPORATION,
KEN-CARYL RANCH CORPORATION,
JOHNS-MANVILLE IDAHO, INC.,
MANVILLE CANADA SERVICE INC.,
SUNBELT CONTRACTORS, INC.,

Debtors.

ORDER CONFIRMING DEBTORS' SECOND AMENDED AND RESTATED PLAN OF REORGANIZATION

The above captioned debtors and debtors in possession (collectively "Manville" or the "Debtors"), having jointly filed with this Court under chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 1101 *et seq.* (the "Code") their Second Amended and Restated Plan of Reorganization dated August 22, 1986, including the addenda, exhibits and schedules thereto, as modified by the Modification dated and filed with this Court on December 16, 1986 (the "Plan") (hereinafter all capitalized terms in this order not defined in this order shall have the meanings defined in the Plan), and hearings having been held before this Court on notice to all creditors, shareholders and other parties in interest to these Cases to consider Manville's First Amended Disclosure Statement dated August 22, 1986 (the "Disclosure Statement"), and the Disclosure Statement having been approved by order of this Court dated August 28, 1986, and a copy of the Plan, the Dis-

closure Statement and various related materials having been transmitted to all known holders of Claims or Interests in these cases as provided in the order approving the Disclosure Statement, and the solicitation of acceptances from holders of Claims or Interests in these cases having been made in the manner required by this Court, and objections to the Plan and the confirmation thereof having been filed by John E. MacLean, Armstrong World Industries, Inc., et al., Lawrence Kane (who claims to speak for approximately 800 AH Claimants), Carl M. Alberto, et al. (approximately 300 holders of Manville common stock), Action on Smoking and Health and the former Committee of Equity Security Holders (collectively the "Objections"), and a full evidentiary hearing to consider confirmation of the Plan, the Objections and other matters relating to confirmation having been held before me on December 16, 1986 (the "Hearing") upon extensive notice as heretofore directed by this Court's order dated August 28, 1986 (the "Notice Order"), and the affidavits of service and publication filed herein evidencing compliance with the Notice Order, and upon the entire record of these Cases and the minutes taken before me at the Hearing, and upon the decision and findings of this Court issued on December 18, 1986 confirming the Plan (the "Decision"), which Decision is incorporated herein by reference, and upon the respective certifications of The Corporation Trust Company and Morgan Shareholder Services Trust Company appointed by the Notice Order to tabulate the ballots cast in favor of and in opposition to the Plan and the original ballots (the "Ballots")

having been filed herein, and upon all proceedings heretofore had herein, and after due deliberation and sufficient cause appearing therefor, and

IT APPEARING and the Court having found, that:

(a) The Plan, with the exception of Class 8 Interests, has been duly accepted in accordance with § 1126 of the Code by all classes of Claims or Interests impaired under the Plan.

(b) The Plan complies with the applicable provisions of chapter 11 of the Code.

(c) The Debtors, as proponents of the Plan, have complied with all applicable provisions of the Code.

(d) The Plan specifies the classes of Claims or Interests not impaired under the Plan.

(e) The Plan identifies the classes of Claims or Interests impaired under the Plan and specifies the treatment of Claims or Interests in such classes.

(f) The Plan provides the same treatment for each Claim or Interest of a particular class.

(g) The classification of Claims and Interests under the Plan is consistent with § 1122 of the Code.

(h) The Plan provides adequate means for the execution and implementation of the Plan.

(i) No governmental regulatory commission has jurisdiction over rates charged by the Debtors.

(j) The treatment of Claims under the Plan of the type specified in §§ 507(a)(1), 507(a)(3), 507(a)(4) and 507(a)(6) of the Code, complies with the provisions of § 1129(a)(9) of the Code.

(k) The primary purpose of the Plan is not the avoidance of taxes or the avoidance of the requirements of Section 5 of the Securities Act of 1933.

(l) The Debtors' objectives in proposing the Plan were to:

(i) Preserve and protect the viable businesses;

(ii) Provide a simple, economical procedure for obtaining and encouraging the prompt, efficient and equitable resolution of AH Claims and Other Asbestos Obligations and to provide for the efficient delivery of equitable compensation to all asbestos health claimants;

(iii) Resolve $80 billion of PD Claims through a claims facility and to avoid extensive mass litigation;

(iv) Provide payment to all other creditors; and

(v) Preserve value, to the extent possible, for equity security holders.

(m) The Plan has been proposed in good faith and not by any means forbidden by law.

(n) Any payments made or promised by the Debtors for services or for costs and expenses in

connection with the Plan and incident to these cases, have been disclosed to this Court, and any such payments made before confirmation are reasonable or, if such payments are to be fixed after confirmation of the Plan, such payments are subject to approval of this Court as reasonable.

(o) The Debtors have disclosed the identity and affiliations of the individuals proposed to serve, after confirmation of the Plan, as directors or officers of the reorganized Debtors and their affiliates and as trustees of the Trust and the PD Trust, and the continuance or appointment of such individuals to such offices is consistent with the interests of creditors, equity security holders, other parties in interest to these Cases and with public policy, and the Debtors have disclosed the identity of any insider that will be employed or retained by the reorganized Manville and the nature of any compensation for such insider.

(p) The procedures by which the Ballots were distributed and tabulated were fair, properly conducted and complied with the prior orders of this Court.

(q) In accordance with the special voting procedures approved by order of this Court dated June 23, 1986, Ballots accepting the Plan have been timely received from holders of Class 3 Claims representing more than two-thirds in number of buildings and more than one-half in number of Class 3 Claims which voted on the Plan.

(r) In accordance with the special voting procedures approved by order of this Court dated

June 23, 1986, Ballots accepting the Plan have been timely received from holders of Class 4 Claims representing more than two-thirds of the holders of such claims that voted on the Plan.

(s) With respect to the claims of the kind specified in Class 6 of the Plan, Ballots accepting the Plan have been timely received representing more than two-thirds in dollar amount and more than one-half in number of the holders of claims in Class 6 which voted on the Plan.

(t) With respect to Interests of the kind specified in Class 7 of the Plan, Ballots accepting the Plan have been timely received representing at least two-thirds in number of the Interests of such class which have been voted.

(u) With respect to Interests of the kind specified in Class 8 of the Plan (consisting of the holders of all outstanding shares of Manville Common Stock), Ballots accepting the Plan have been timely received representing approximately forty-eight percent in number of the Interests of such class held by the holders of such Interests who voted; thus, the Plan has not been accepted by Class 8.

(v) The Plan does not discriminate unfairly against and is fair and equitable with respect to Class 8 Interests and meets the requirements of § 1129(b) of the Code in that:

> (i) No class of Claims or Interests junior in priority to Class 8 Interests is receiving any property of the Debtors under the Plan;

(ii) The aggregate amount to be received by holders of Claims or Interests senior to Class 8 does not exceed the aggregate amount of such senior Claims or Interests;

(iii) On a "going concern" basis, the aggregate amount of Claims and Class 7 Interests exceeds the fair valuation of the Debtors' assets, thus, the value of the Class 8 Interests in the Debtors is zero on a best case basis (utilizing the highest value for the businesses and the lowest estimate of liabilities); and

(iv) With respect to Interests of the kind specified in Class 9 of the Plan, Ballots accepting the Plan have been timely received representing at least two-thirds in number of the Interests of such Class held by the holders of such Interests who voted. The Plan provides that holders of Class 9 Interests shall receive no property of the Debtors under the Plan.

(w) With respect to each class, each holder of a Claim or Interest of such class has accepted the Plan or will receive or retain under the Plan on account of such Claim or Interest property of a value, as of the Consummation Date, that is not less than the amount that such holder would receive or retain if Manville were liquidated under chapter 7 of the Code.

(x) At least one class of Claims has accepted the Plan, which acceptance has been determined without including any acceptance of the Plan by any insider holding a Claim of such class.

(y) The Plan is feasible. The Debtors have demonstrated their ability to meet their financial obligations under the Plan and continue their businesses in the regular course. Confirmation and consummation of the Plan are not likely to be followed by the liquidation, or the need for further financial reorganization, of the Debtors, the Trust or the PD Trust.

(z) All securities to be issued by Manville pursuant to the Plan are being issued in exchange for Claims against or Interests in Manville.

(aa) The permanent injunction provided in Article IX, paragraph 9.2.A(3) of the Plan and which is set forth in paragraph 29 herein (the "Injunction"), is essential to the viability of the business operations of the Debtors and to the successful implementation of the Plan. Notice of the Injunction and other relief related to confirmation has been provided by means reasonably calculated to inform all those affected by this Order and the opportunity to object to the relief was afforded to all interested parties.

(bb) If the Injunction is not issued to protect the Debtors from the assertion of asbestos claims and liabilities, the Debtors' would be unable to continue operating their businesses and to make the payments required under the Plan, including payments to the Trust which will be used to pay in full AH Claims and Other Asbestos Obligations. In the absence of the Injunction, one of the central purposes of title 11, *i.e.* preventing the inequitable, piece-meal dismemberment of the Debtors' estates, cannot be achieved.

(cc) Barring the assertion of punitive damages by holders of AH Claims and Other Asbestos Obligations is in the best interests of all such persons because the payment of such damages would deplete funds available for all asbestos health claimants and could seriously delay or prevent compensation of persons who may assert Other Asbestos Obligations. The holders of AH Claims have voted overwhelmingly to accept the Plan which bars the assertion of punitive damage claims.

(dd) It would be an improper and inequitable result if holders of AH Claims were barred from asserting Claims for punitive damages while persons who may assert Other Asbestos Obligations were not so barred.

(ee) The conditions precedent to confirmation of the Plan have been satisfied, including

(i) The Debtors have received the tax rulings, opinions or other assurances referred to in Article IX, paragraph 9.1.A of the Plan and the other constituencies therein provided have indicated their satisfaction thereto;

(ii) The PD Guidelines have been established and are set forth in Annex 3 to the PD Trust Agreement;

(iii) The Court entered an order on August 28, 1986 fixing the last day for the filing of proofs of claims by holders of AH Claims;

(iv) The Court entered an order on December 12, 1986 substantively consolidating the Cases in accordance with Article VI of the Plan;

(v) The Court entered an order on June 23, 1986 establishing the method of voting on the Plan by the holders of Class 3 Claims and the holders of Class 4 Claims; and

(vi) This Order provides for the issuance of the Injunction, authorizes the Trust to implement the Claims Resolution Facility and the PD Trust to implement the PD Claims Resolution Facility, and bars the assertion of punitive damage claims by holders of Class 3 Claims, holders of Class 4 Claims (not including Liquidated AH Claims to the extent the final judgments provide for punitive damages) and by persons asserting Other Asbestos Obligations.

(ff) The Modification to the Plan dated December 16, 1986 does not adversely change the treatment of the Claim of any creditor or the Interest of any equity security holder who has not accepted the Plan.

(gg) The findings contained in the order of this Court dated December 18, 1986 approving the settlement agreements between the Debtors and the insurers and insurance brokers listed therein are incorporated herein by reference. In view of the retention of jurisdiction by this Court over all applications for approval of settlement agree-

ments between the Debtors and their insurers and insurance brokers; and whereas an application dated December 15, 1986 seeking approval of settlement agreements between the Debtors and Columbia Casualty Company and Continental Casualty Company were filed with this Court and will be considered and determined, upon entry of the findings and orders of this Court approving those settlement agreements, such findings and orders shall be deemed incorporated by reference in this Order.

(hh) It appears that the Debtors will satisfy each and every condition precedent to consummation of the Plan set forth in Article IX, paragraph 9.2 of the Plan.

(ii) The definition of "Postpetition Interest Ratio" set forth at M-154 of the Disclosure Statement, states that any Allowed Class 6 Claim that is solely a Claim for damages shall be deemed unliquidated for the purposes of clauses (w) and (x) of that definition. This does not affect the treatment of Class 6 Claims in an amount that has been liquidated by a Final Order, which will be entitled to compensation in lieu of postpetition interest as described in the Plan; and

IT FURTHER APPEARING and the Court having concluded as a matter of law as more fully discussed in the Decision that:

(a) The Court, as a court of equity whose jurisdiction is governed by equitable principles, has the constitutional and statutory power and authority to issue and enter the Injunction. Due and timely notice of the Injunction has been

given in a manner reasonably calculated under all the circumstances to apprise interested parties of the pendency of the hearing to consider the Injunction and afford them an opportunity to present their objections.

(b) The Court may exercise its equitable power and authority to issue injunctive relief where there is a basis for concluding that reorganization or rehabilitation of the Debtors might be undermined and frustrated by the actions sought to be enjoined.

(c) The Court has the power and duty to sift through the surrounding circumstances to prevent injustice or unfairness and has the power to create new remedies where those at law are inadequate.

(d) The Court has the equitable and inherent power and authority to channel claims to a specific *res* and may limit the direct or indirect prosecution of such claims against the Debtors and prohibit parties in interest from attempting to circumvent the Plan and the orders of this Court.

(e) In exercising its inherent equitable powers, the Court may grant injunctive relief to prevent direct or indirect interference with the administration of the estate and facilitate the Debtors' reorganization effort to enable the Debtors to achieve the ultimate objectives of chapter 11, reorganization and rehabilitation. The Court may enjoin or otherwise limit future litigation associated with the Cases which could undermine and frustrate the Plan or the Debtors' reorganization.

(f) The purpose of punitive damages is to punish tort feasors and to deter them from further wrongful conduct. This purpose would not be served by permitting AH Claimants and persons who may assert Other Asbestos Obligations to recover punitive damages from the Trust.

(g) The Court has the equitable power and authority to bar the assertion of punitive damages by persons who may assert Other Asbestos Obligations.

(h) Nothing in the Code prohibits payments in lieu of post-petition interest under a plan of reorganization in a chapter 11 case.

(i) The vesting of all property, assets and effects of the estates of each of the respective Debtors in each of the respective Debtors free and clear of all Claims and Interests of creditors and equity security holders and of Other Asbestos Obligations pursuant to § 1141(b) and (c) of the Code does not constitute a fraudulent conveyance.

IT IS THEREFORE,

NOW, on motion of LEVIN & WEINTRAUB & CRAMES and DAVIS POLK & WARDWELL, co-counsel to Manville,

ORDERED, ADJUDGED AND DECREED that:

(1) The Plan is hereby confirmed.

(2) Consistent with the Plan and in particular Article V thereof entitled "Means of Execution of the Plan", the following agreements and documents which are attached as exhibits to the Plan,

including all annexes thereto (collectively the "Agreements") and all terms and provisions thereof are hereby approved:

(a) The Manville Personal Injury Settlement Trust Agreement, the By-Laws, the Claims Resolution Procedures, the Supplemental Agreement, the Bond, the Second Bond and the Co-Defendants' Procedures;

(b) The Property Damage Settlement Trust Agreement, the PD By-Laws, the PD Claims Resolution Facility, the PD Distribution Guidelines, the PD Supplemental Agreement, the PD Bond, the Transfer Guidelines and the Note;

(c) The Class 6 Indenture;

(d) The Trust Note;

(e) The Class 6 Interest Indenture;

(f) The Warrant Agreement;

(g) The Special Fund Trust Agreement and Special Fund Trust By-Laws; and

(h) The Charter.

(3) Manville be and it hereby is authorized to enter into, execute, deliver and/or implement the Agreements and other documents and instruments substantially consistent therewith and any amendments to such Agreements as therein provided, and to take such other steps and perform such other acts as may be necessary to imple-

ment and effectuate the Plan and/or the Agreements approved in this Order.

(4) Donald M. Blinken, Daniel Fogel, Francis H. Hare, Jr., Christian E. Markey, Jr., John C. Sawhill and Harold R. Tyler, Jr. (collectively the "Trustees"), be, and they hereby are approved as trustees of the Trust.

(5) Honorable Thomas F. Eagleton, Robert B. McKay and Daniel Reed Weedon be, and they hereby are, approved as trustees of the PD Trust.

(6) Stanley J. Levy, Frederick M. Baron, Thomas W. Henderson, Gene Locks, Ronald L. Motely and the Trustees be, and they hereby are, approved as trustees of the Asbestos Victims Special Fund Trust.

(7) Distributions required to be made to the holders of Claims against and to the holders of Interests in the Debtors shall be made to the entities entitled thereto as provided in the Plan.

(8) The Plan and its provisions shall be binding upon the Debtors, any entity acquiring property under the Plan, any holder of a Claim against or Interest in the Debtors, whether or not the Claim or Interest of such creditor or equity security holder or obligation of any party in interest is impaired under the Plan and whether or not such creditor, equity security holder or party in interest has accepted the Plan.

(9) Except as otherwise provided in the Plan and the Agreements, the Debtors are discharged and released from any and all debts that arose before the Confirmation Date and any and all

debts of a kind specified in §§ 502(g), 502(h) or 502(i) of the Code whether or not (a) a proof of claim based on such debt has been filed under § 501 of the Code; (b) such Claim is allowed under § 502 of the Code; (c) such Claim is listed on the Debtors' schedules and lists heretofore filed herein; or (d) the holder of such Claim has accepted the Plan.

(10) Effective on the Consummation Date and in accordance with Article VII of the Plan, the Old Common Stock, the Old Preferred Stock, the JM Debentures, the JM Notes, the JM Debenture Indenture and the JM Note Indenture shall all be and hereby are deemed to be cancelled, terminated and void, rendered nugatory and of no force, effect or value.

(11) In accordance with Article VII of the Plan, in the event any holder of issued and outstanding Old Common Stock, Old Preferred Stock, JM Notes or JM Debentures fails within five (5) years after the Consummation Date to surrender to Manville, the JM Note Trustee or the JM Debenture Trustee, as the case may be, such certificates or other instruments evidencing the holder's interests, or the non-availability of his certificate or other instruments is established to the satisfaction of Manville, the JM Note Trustee or the JM Debenture Trustee, as the case may be, no distribution under the Plan shall be made to any such holder.

(12) All creditors and equity security holders of the Debtors or other entities whose Claims are discharged or whose Interests are terminated by the Plan and this Order are hereby jointly and

severally restrained and enjoined from instituting or continuing any action or employing any process to collect such debts or pursue such Interests as liabilities or obligations of the Debtors, except as otherwise specifically provided by this Order, the Plan or the Agreements. Except as otherwise provided in the Plan and the Agreements, all entities which are parties to adversary proceedings or contested matters pending before this Court, which proceedings are not finally determined as at the date of this Order, are restrained and enjoined from commencing any other proceedings or taking any other actions against the Debtors with respect to any issue raised in such adversary proceedings or contested matters, except upon further order of this Court.

(13) Effective upon the Confirmation Date, pursuant to the provisions of § 1141(b) and (c) of the Code, all property, assets and effects of the estates of each of the respective Debtors shall vest in each of the respective Debtors, free and clear of all Claims and Interests of creditors and equity security holders and of Other Asbestos Obligations.

(14) In accordance with the order substantively consolidating the Cases dated December 12, 1986, all proceeds, together with the interest earned thereon, being held in escrow by the Debtors or which proceeds the Debtors were prohibited from using in the ordinary course pursuant to the (i) order approving the sale of real property in Bossier Parish, Louisiana dated September 8, 1982; (ii) order authorizing the sale of assets of Transponder Corp. dated November

24, 1982; (iii) order authorizing sale of property in Sun Valley, Idaho dated March 11, 1983; (iv) order authorizing sale of shares in Belgium Operations dated February 25, 1983; (v) order authorizing sale of shares of certain Eternit Companies dated March 25, 1983; (vi) order authorizing sale of property in Winnfield, Louisiana; (vii) order authorizing sale of shares of Canadian Operations dated August 11, 1983; (viii) order authorizing sale of certain property located in West Monroe, Louisiana dated August 29, 1983; (ix) order authorizing sale of shares in Canadian Operations dated September 15, 1983; (x) order authorizing conveyance of real property to the Valley Joint Venture dated November 1, 1983; (xi) order approving transfer of assets to Pine Pipeline dated December 21, 1983; (xii) order authorizing sale of property in Edison, New Jersey dated January 12, 1984; (xiii) order authorizing sale of property in Fresno, California dated January 12, 1984; (xiv) order authorizing sale of shares in Papier Kingsey Falls dated February 1, 1984; (xv) order authorizing sale of real property in Monroe, Louisiana dated March 9, 1984; (xvi) order authorizing sale of assets of Sunbelt Contractors, Inc. dated March 13, 1984; (xvii) order approving sale of aircraft dated September 12, 1985; (xviii) order authorizing sale of assets of Manville Canada, Inc. dated January 7, 1986; (xix) order authorizing capital expenditure to purchase and sell corporate aircraft dated September 23, 1986; and (xx) any other order which restricted the Debtors from using proceeds realized from the sale or transfer of assets, are hereby modified solely to the extent that pro-

ceeds of such sales shall be available for use by the Debtors in the ordinary course of business, including but not limited to, the payment of the Debtors' obligations under the Plan and the provisions of the aforesaid orders are deemed modified solely to the extent of deleting any restriction on Manville's use of such cash.

(15) Effective as of the Consummation Date as provided in Article IV, paragraph 4.1 of the Plan, title to the property of Manville set forth and described therein shall be transferred to and automatically vested in the Trust as set forth in the Plan and the Trust Agreement.

(16) Effective as of the Consummation Date as provided in Article IV, paragraph 4.2 of the Plan, title to the property of Manville set forth and described therein shall be transferred to and automatically vested in the PD Trust as set forth in the Plan and the PD Trust Agreement. In addition, effective on the Consummation Date, the Trust shall transfer to the PD Trust, in accordance with Article IV, paragraph 4.2 of the Plan and the PD Supplemental Agreement, $25 million in cash together with any interest accrued on such cash for the period and at the rate specified in Article V, paragraph 5.4 of the Plan.

(17) On the Consummation Date, Manville shall transfer and assign, or cause to be transferred and assigned, to the Special Fund Trust $5 million in cash, together with interest accrued thereon pursuant to Article V, paragraph 5.4 of the Plan.

(18) Pursuant to Article VIII of the Plan, and in accordance with § 1123(b)(2) of the Code, except for any and all executory contracts and unexpired leases and subleases of the Debtors that (a) are the subject of pending motions to reject or (b) have been rejected by the Debtors pursuant to previous orders of this Court or (c) are set forth and described in paragraph 8.2 of Article VIII of the Plan, all executory contracts and unexpired leases and subleases of the Debtors are assumed by the Debtors effective on the Consummation Date, at which time the Debtors shall cure any monetary defaults existing with respect to such executory contracts and unexpired leases and subleases upon the Consummation Date, or as soon thereafter as may be practicable; *provided, however*, that in the event of a dispute between the Debtors and any other party to such executory contract or unexpired lease or sublease with respect to the amount of an existing monetary default, the parties shall endeavor to resolve such dispute within thirty (30) days following entry of this order and, thereafter shall, if necessary, submit any remaining controversies to this Court for resolution. The Court shall retain jurisdiction for the purpose of determining all controversies with respect to the amount of such monetary defaults.

(19) Pursuant to Bankruptcy Rule 3002(c)(4), proofs of claim for damages arising from the rejection of executory contracts and unexpired leases and subleases pursuant to Article VIII, paragraph 8.2 of the Plan shall be filed with the Clerk of the Court and the Debtors within thirty

(30) days after the mailing of notice of entry hereof to the parties thereto. With respect to executory contracts and unexpired leases and subleases which are the subject of motions to reject which are pending as of the date of this Order, within thirty (30) days of entry of an order authorizing the Debtors to reject such executory contracts and unexpired leases and subleases, proofs of claim for damages arising by virtue of the rejection of such agreements shall be filed with the Clerk of the Court and served upon the Debtors.

(20) The filing of proofs of claim for damages arising from the rejection of executory contracts and unexpired leases and subleases shall be without prejudice to the rights of the Debtors to object to any such proofs of claim.

(21) The Debtors may file within sixty (60) days from the date of receipt of notice that any proof of claim is filed in accordance with paragraph (19) herein, any and all objections to the allowance of any such Claim and shall bring on such objections for hearing within one hundred (100) days from the date of receipt of notice that any such proof of claim has been filed, unless such periods of time are extended by order of the Court for cause shown, and in the event of a failure to do so, any objections to the allowance of the Claims affected thereby will be deemed waived.

(22) Pursuant to the Plan, and in accordance with § 1123(a)(5)(I) of the Code, Manville is hereby authorized to take such corporate action as may be necessary and appropriate to imple-

ment and effectuate the consummation of the Plan and this Order. This Order shall constitute all approvals and consents, if any, required by the General Corporation Law of the State of Delaware (the "Corporation Law") with respect to the implementation and consummation of the Plan.

(23) In accordance with Article XI, paragraph 11.2 of the Plan, the Charter of Manville be and it hereby is amended to prohibit the issuance of non-voting equity securities during the term of the Plan and Manville is directed to take such corporate action and execute such documents as may be necessary to give effect to the amendment contemplated by the Plan and authorized by this Order.

(24) The Charter shall be filed with and accepted by the Secretary of the State of Delaware and recorded in accordance with § 103 of the Delaware Corporation Law and shall thereupon become effective in accordance with its terms and the provisions of the Delaware Corporation Law.

(25) Except with respect to Class 3 Claims and Class 4 Claims, and except as otherwise provided in this Order, the Debtors may file within one hundred and twenty (120) days from the date of this Order any and all objections to the allowance of any Claim not heretofore objected to, including any and all applications to amend their Schedules, and shall bring on such objections or applications for hearing within one hundred and sixty (160) days from the date of this Order, unless such periods of time are extended by order of the

Court for cause shown, and in the event of a failure to do so, any objections to the allowance of the Claims affected thereby will be deemed waived. With respect to Contribution Claims, objections to such claims shall be filed in the manner and by the time provided in the Co-Defendants' Procedures. The Debtors may file within one hundred and twenty (120) days from the date of this Order any and all objections to the allowance of any Indemnity Claim not heretofore objected to and shall bring on such objections for hearing within one hundred and sixty (160) days from the date of this Order, unless such periods of time are extended by order of the Court for cause shown, and in the event of a failure. to do so, any objections to the allowance of Indemnity Claims affected thereby will be deemed waived.

(26) Any and all objections to PD Claims filed by any party in interest in these cases which are pending as of the date of this Order be, and they hereby are, dismissed with prejudice.

(27) The Debtors are hereby authorized and directed to make distribution of the payments required on the Consummation Date, as defined in the Plan, or as soon as practicable thereafter.

(28) The Court hereby retains jurisdiction of these proceedings pursuant to and for the purposes of §§ 105(a) and 1127 of the Code and for such purposes as may be necessary or useful to aid the confirmation and consummation of the Plan and implementation of the Plan as provided in the Plan and for the following purposes, *inter alia*:

(a) To determine any and all objections to the allowance of Claims to the extent permitted by law (excluding Class 3 Claims and Class 4 Claims other than Contribution Claims and Indemnity Claims, to the extent the Plan provides that the allowance of such Claims shall be determined by the Court) and amendments to Schedules;

(b) Except as otherwise provided in paragraph (21)(a) above, to determine any and all disputes arising under the Plan, the Trust Agreement, the PD Trust Agreement, the annexes and exhibits to the PD Trust Agreement and the Settlement Agreements;

(c) To determine any and all applications for allowance of compensation and reimbursement of expenses herein;

(d) To determine any and all pending applications for rejection of executory contracts and unexpired leases and the allowance of any Claims resulting from the rejection thereof or from the rejection of executory contracts or unexpired leases pursuant to the Plan;

(e) To determine any and all applications for approval of Settlement Agreements and to grant and enforce appropriate orders in connection therewith;

(f) To enforce and administer the provisions of the Plan and, to the extent expressly provided therein, the exhibits thereto and the annexes to the exhibits;

(g) To modify any provision of the Plan to the full extent permitted by the Code;

(h) To correct any defect, cure any omission or reconcile any inconsistency in the Plan or this Order as may be necessary to carry out the purposes and intent of the Plan;

(i) To determine such other matters as may be provided for in this Order or as may from time to time be authorized under the provisions of the Code, any other applicable law including, without limitation, matters contemplated under Section 6.03(c) of the PD Trust Agreement;

(j) To enforce all orders, judgments, injunctions and rulings entered in connection with the Cases; and

(k) Enter such orders as may be necessary or appropriate in aid of confirmation and to facilitate implementation of the Plan.

(29) All Persons and Governmental Units are hereby stayed, restrained and enjoined from taking one or more of the following actions for the purpose of, directly or indirectly, collecting, recovering or, receiving payment of, on or with respect to any Claim, Interest or Other Asbestos Obligation (other than actions brought to enforce any right or obligation under the Plan, any exhibits to the Plan or any other agreement or instrument between the Debtors and the Trust or the PD Trust, which actions must be in conformity and compliance with the provisions of the Plan):

(a) Commencing, conducting, or continuing in any manner, directly or indirectly, any suit, action or other proceeding (including, without limitation any thereof in a judicial, arbitral, administrative or other forum) against or affecting the Debtors, any of the Debtors' Subsidiaries, the Canadian Companies or any of the Settling Insurance Companies or any property of any of the foregoing or any direct or indirect transferee of any property of, or direct or indirect successor in interest to, any of the foregoing, or any property of any such transferee or successor;

(b) Enforcing, levying, attaching (including, without limitation, any pre-judgment attachment), collecting or otherwise recovering by any means or in any manner, whether directly or indirectly, any judgment, award, decree or other order against the Debtors, any of the Debtors' Subsidiaries, the Canadian Companies or any of the Settling Insurance Companies or any property of any of the foregoing or any direct or indirect transferee of any property of, or direct or indirect successor in interest to, any of the foregoing, or any property of any such transferee or successor;

(c) Creating, perfecting or otherwise enforcing in any manner, directly or indirectly, any Encumbrance against the Debtors, any of the Debtors' Subsidiaries, the Canadian Companies or any of the Settling Insurance Companies or any property of any of the foregoing Persons, or any direct or indirect transferee of any property of, or successor in interest to, any of the foregoing Per-

sons, or any property of any such transferee or successor;

(d) Setting-off, seeking reimbursement of, contribution from or subrogation against or otherwise recouping in any manner, directly or indirectly, any amount against any liability owed to the Debtors, any of the Debtors' Subsidiaries, the Canadian Companies or any of the Settling Insurance Companies, or any direct or indirect transferee of any property of, or successor in interest to, any of the foregoing Persons except as provided in Paragraphs 3.1 and 3.2 of the Plan;

(e) Proceeding in any manner and any place with regard to any matter that is subject to resolution pursuant to the Claims Resolution Facility, except in conformity and compliance therewith; and

(f) Proceeding in any manner in any place with regard to any matter that is subject to resolution pursuant to the PD Claims Resolution Facility except in conformity and compliance therewith, until the termination of the PD Trust.

The provisions of the Injunction barring the assertion of AH Claims and Other Asbestos Obligations against the Debtors shall terminate upon termination of the Trust.

(30) If the period for commencing a civil action on an asbestos-health claim under the applicable statute of limitation did not expire before August 26, 1982, then such period does not expire until the later of (a) the end of such period as provided in the applicable statute of limitations or (b) one

hundred and twenty (120) days after this Order becomes final.

(31) Pursuant to § 1145 of the Code and the provisions of the Securities Act of 1933, as amended (and the regulations pertaining thereto), regarding the issuance, distribution, offer, sale or registration of securities pursuant to the Plan, Manville is exempt from the registration requirements of the Securities Act of 1933. Such exemption shall include, without limitation, Manville Common Stock, Class 6 Interest Debentures, Class 6 Notes, the Note, the PD Bond, the Bond, the Second Bond, the Series A Preferred Stock, the Series B Preference Stock, the Trust Note and the Warrants.

(32) Pursuant to Section 1146(c) of the Code, the issuance, transfer or exchange of a security under the Plan or the revesting, transfer and sale of any real or personal property of Manville in accordance with the Plan shall not be taxed under any state or local law imposing a stamp tax, transfer tax, or similar tax.

(33) With respect to any action based upon a Class 5 Claim commenced prior to the Filing Date in another forum, if the holder of such Claim and the Debtors have not agreed to the settlement of the Claim within ninety (90) days after the Confirmation Date, such action shall, upon the request of the holder of the Class 5 Claim, proceed in the forum in which it was originally commenced, no longer subject to any stay or impediment arising out of this Order or in connection with the Cases.

(34) The Trust be and it hereby is authorized to implement the Claims Resolution Facility.

(35) The PD Trust be and it hereby is authorized and directed to implement the PD Claims Resolution Facility.

(36) All holders of Class 3 Claims and Class 4 Claims (not including Liquidated AH Claims to the extent the Final Judgments provide for punitive damages) and all persons asserting Other Asbestos Obligations be and they hereby are forever barred from asserting punitive damages against the Trust, the PD Trust or the Debtors. Notwithstanding the foregoing, in any case where a death was caused, if the law of the place where the act or the omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, then holders of Class 4 Claims and/or Persons asserting Other Asbestos Obligations shall not be barred from the assertion of Claims for actual or compensatory damages measured by the pecuniary injuries resulting from such death to the Persons respectively, for whose benefit the action was brought, in lieu thereof.

(37) The transfers of property by Manville to the Trust and the Special Fund Trust pursuant to the provisions of Article IV, paragraphs 4.1 and 4.6 of the Plan, the Bond, the Trust, the Note and the Supplemental Agreement (a) are legal, valid and effective transfers of property, (b) vest in the Trust or the Special Fund Trust, as the case may be, good title to such property free and clear of all Encumbrances, debts, obligations, liabilities and Claims, other than Class 4 Claims,

Other Asbestos Obligations and all other liabilities and obligations of the Trust pursuant to the Trust Agreement, the Supplemental Agreement and the PD Supplemental Agreement, (c) do not constitute fraudulent conveyances under the Code or under the laws of the United States, any State, territory, possession or the District of Columbia and (d) do not, except as contemplated by the Trust Agreement and the Supplemental Trust Agreement, subject the Trust, the Special Fund Trust, the Trustees, the Trustees of the Special Fund Trust or the property so transferred to any liability by reason of such transfer under the laws of the United States, any State, territory or possession thereof or the District of Columbia based, in whole or in part, directly or indirectly, on any theory of law, including, without limitation, any theory of successor or transferee liability.

(38) The transfers of property by Manville and the Trust to the PD Trust pursuant to the provisions of Article IV, paragraph 4.2 of the Plan and the PD Supplemental Agreement (a) are legal, valid and effective transfers of property, (b) vest in the PD Trust good title to such property free and clear of all Encumbrances, debts, obligations, liabilities and Claims other than Class 3 Claims and all other liabilities and obligations of the PD Trust pursuant to the PD Trust Agreement and the PD Supplemental Agreement, (c) do not constitute fraudulent conveyances under the Code or under the laws of the United States, any State, territory, possession or the District of Columbia and (d) do not, except as

contemplated by the PD Trust Agreement or the PD Supplemental Agreement, subject the PD Trust, the PD Trustees or the property so transferred to any liability by reason of such transfer under the laws of the United States, any State, territory or possession thereof or the District of Columbia based, in whole or in part, directly or indirectly, on any theory of law, including, without limitation, any theory of successor or transferee liability.

Dated: New York, New York
December 22 1986 at
12:07 o'clock p.m.

/s/ BURTON R. LIFLAND
UNITED STATES BANKRUPTCY JUDGE

[SEAL]

NOTICE OF ENTRY

Please take notice that the within is a (*certified*) [ILLEGIBLE] copy of a [ILLEGIBLE] entered in the office of the clerk of the within [ILLEGIBLE] court on [ILLEGIBLE]

Yours, etc.,
LEVIN & WEINTRAUB & CRAMES

Attorneys for

Office and Post Office Address
225 BROADWAY
BOROUGH OF MANHATTAN
NEW YORK, N.Y. 10007

Attorneys for

NOTICE OF SETTLEMENT

Please take notice that an order

which the within is a true copy will be presented settlement to the Hon.

of the judges of the within named Court, at [ILLEGIBLE]

Yours, etc.,
LEVIN & WEINTRAUB & CRAMES

Attorneys for

Office and Post Office Address
225 BROADWAY
BOROUGH OF MANHATTAN
NEW YORK, N.Y. 10007

Attorneys for

Index No. 82 B 22656 Through
82 B 11676 (BRL)

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE:

JOHNS-MANVILLE CORPORATION, et al.,

Debtors.

ORDER CONFIRMING DEBTORS' SECOND AMENDED AND RESTATED PLAN OF REORGANIZATION

LEVIN & WEINTRAUB & CRAMES

Attorneys for Debtors.

225 BROADWAY
BOROUGH OF MANHATTAN
NEW YORK, N.Y. 10007

(212) 962-3300

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In Proceedings for a Reorganization
Under Chapter 11

Case Nos. 82 B 11656
through 82 B 11676 (BRL)

In re
JOHNS-MANVILLE CORPORATION, *et al.*,

Debtors.

NOTICE OF SUBMISSION OF ORDER AND INTENTION TO OBTAIN ENTRY THEREOF

SIRS:

PLEASE TAKE NOTICE that an "Order With Respect to Insurance Settlement Agreements" of which the within is a true copy will be presented for approval and entry to the Honorable Burton R. Lifland, United States Bankruptcy Judge, at the United States Courthouse, Foley Square, New York, New York 10007 on December 18, 1986 at 10:00 A.M. in Room 237 and notice of the relief requested is being given to all parties listed on the service list attached to such order.

Dated: New York, New York
December 17, 1986

YOURS, etc.

Attorneys for Johns-Manville
Corporation, *et al.*, Debtors
and Debtors in Possession

DAVIS POLK & WARDWELL
1 Chase Manhattan Plaza
New York, New York 10005
(212) 530-4000

LEVIN & WEINTRAUB & CRAMES
225 Broadway
New York, New York 10005
(212) 962-3300

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In Proceedings for a Reorganization
Under Chapter 11

Case Nos. 82 B 11656
through 82 B 11676 (BRL)

In re
JOHNS-MANVILLE CORPORATION, *et al.*,

Debtors.

ORDER

WHEREAS, Manville Corporation, for and on behalf of itself and each of its affiliates, Johns-Manville Corporation, Johns-Manville Sales Corporation (now known as Manville Sales Corporation), Johns-Manville International Corporation, Johns-Manville Canada Inc. (now known as JM Asbestos Inc.), and Johns-Manville Amiante Canada Inc. (now known as JM Asbestos Inc.), debtors and debtors in possession in these proceedings (collectively, "Manville"), have entered into various settlement agreements (collectively, the "Settlement Agreements"), with certain settling insurers and insurance brokers (collec-

tively, the "Settling Insurers"), identified in the list attached hereto as Exhibit A;

WHEREAS, by applications dated August 2, 1984 and October 27, 1986 (the "Applications") Manville sought approval of the Bankruptcy Court, pursuant to Rule 9019 of the Rules of Bankruptcy Procedure, of the Settlement Agreements;

WHEREAS, upon notices duly given, hearings pursuant to Rule 9019 of the Rules of Bankruptcy Procedure were held on various aspects thereof at various dates, including November 19, 1986, to consider approval of the Settlement Agreements; and

WHEREAS, the Court has duly considered the Applications, and the testimony offered at said hearings;

IT IS HEREBY ORDERED AND ADJUDGED AND DECREED that after consideration of the foregoing and the materials referred to above:

> The Settlement Agreements listed on Exhibit A hereto, and the execution, delivery and performance of such Settlement Agreements by Manville, are hereby approved pursuant to Rule 9019 of the Rules of Bankruptcy Procedure.

1. IT IS HEREBY FURTHER ORDERED AND ADJUDGED AND DECREED with respect to the Settlement Agreement dated as of November 22, 1985, between The Aetna Casualty and Surety Company, on the one hand, and Manville Corporation, et al., on the other hand, that:

1.1 *Definitions.* As used in this Paragraph and Paragraph 1.2 below, the following defined terms have the following meanings:

"Affiliate" of another Person means any Person directly or indirectly controlling, controlled by, or under common control with, such other Person. The term "controlling" (including, with correlative meaning, the terms "controlled by" or "under common control with"), as used with respect to any Person, shall mean the possession, directly or indirectly, of the power to cause the direction of the management and policies of such Person, whether through the ownership of securities, by contract or otherwise.

"Code" means the laws of the United States relating to bankruptcy or reorganization, including, without limitation, Title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.*, as amended.

"Final Order" means a judgment, order or other decree approved or entered by any State or Federal Court (including, without limitation, this Court) located in one of the States, or the District of Columbia, which judgment, order or other decree has not been reversed or stayed and as to which the time to appeal has expired and as to which no appeal, petition for rehearing or petition for certiorari is pending (or if such appeal has been filed or any such petition has been granted, it has been finally decided and such judgment, order or other decree has not been reversed or stayed).

"JCP No. 1072" means Judicial Council Proceeding No. 1072, presently pending in the Superior Court of the State of California, County of

San Francisco, which includes the JM Included Action.

"JM Debtors" means Johns-Manville Corporation and each of its Affiliates which filed a petition for reorganization under Chapter 11 of the Code with this Court on August 26, 1982, unless such corporation has had or will have a plan of reorganization confirmed by an order of this Court which is a Final Order prior to the Plan Confirmation Date.

"JM Group" means the JM Insureds and the present, former and future directors, officers and employees of one or more JM Insureds.

"JM Included Action" means that portion of JCP No. 1072 represented by the allegations and claims of the JM Plaintiffs against the Settling Insurer with respect to the Policies and the allegations and claims of the Settling Insurer against the JM Plaintiffs with respect to the Policies.

"JM Insureds" means Manville Corporation, the JM Plaintiffs and each other Person (except natural persons) who was or is an Affiliate of Manville Corporation or Johns-Manville Corporation.

"JM Plaintiffs" means Johns-Manville Corporation, Johns-Manville Sales Corporation (now known as Manville Sales Corporation), Johns-Manville International Corporation, Johns-Manville Canada Inc. (now known as JM Asbestos Inc.) and Johns-Manville Amiante Canada Inc. (now known as JM Asbestos Inc.), each of which is a named plaintiff in JCP No. 1072.

"Person" means an individual, a corporation, a partnership, an association, a trust or any other entity or organization, including, without limitation, any government or political subdivision or an agency or instrumentality thereof.

"Plan" means the Second Amended and Restated Plan of Reorganization of Manville Corporation dated August 22, 1986, as filed with this Court on June 4, 1986, as it may be amended, modified or superseded from time to time, in the form in which it is confirmed by a Final Order of this Court.

"Plan Confirmation Date" means the date on which the Plan Confirmation order becomes a Final Order.

"Plan Confirmation Order" means the order entered by this Court confirming the Plan.

"Policies" mean the following insurance policies (and only the following insurance policies) issued by the Settling Insurer to the JM Insureds:

Policy Number	Policy Periods (for information only)
01 XN 773 WCA	7/01/75 - 7/01/76
01 AL 260802 SRA	7/01/76 - 7/01/77
01 XN 1053 WCA	7/01/76 - 7/01/77
985 LG 30516 SRA	7/01/76 - 7/01/77
01 XN 1405 WCA	7/01/77 - 7/01/78

"Policy Claims" means any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be, asserted by any Person against any or all members of the JM Group or against any or all mem-

bers of the Settling Insurer Group based upon, arising out of or relating to the Policies.

"Settlement Agreement" means the Settlement Agreement dated as of November 22, 1985, between the Settling Insurer, on the one hand, and Manville Corporation, et al., on the other hand.

"Settlement Amount" means Fourteen Million Two Hundred Fifty Thousand Dollars ($14,250,000), consisting of three installment payments as described in the Settlement Agreement.

"Settlement Fund" means the Settlement Amount, or any portion thereof that has been deposited as an installment payment of the Settlement Amount, upon deposit with (or in accordance with the written instructions of) the Clerk of this Court in accordance with the provisions of Paragraph 2 of the Settlement Agreement, and all investment income thereon and gains or losses attributable thereto after any such deposit.

"Settling Insurer" means The Aetna Casualty and Surety Company.

"Settling Insurer Group" means the Settling Insurer and each of its present, former and future directors, officers, and employees.

Where the context so requires, each defined term stated in a singular form shall include the plural form, and each defined term stated in a plural form shall include the singular form.

1.2 *Orders.*

(A) The disposition of the Settlement Fund is subject to the jurisdiction and further order of this Court;

(B) any and all claims, charges or encumbrances which might otherwise have been assessable or assertable by any Person against or with respect to the JM Group's rights and interests based upon, arising out of or related to any or all of the Policies, and any and all claims or causes of action in law, equity, admiralty or otherwise based upon, arising out of, or related to any or all of the Policies or which were or are assessable or assertable by any Person against any or all of the Policies or any or all members of the Settling Insurer Group, are transferred, and shall attach, solely to the Settlement Fund;

(C) upon payment by the Settling Insurer of its Settlement Amount in accordance with the terms and provisions of the Settlement Agreement, the Settling Insurer and its Settling Insurer Group shall have no further duties or obligations based upon, arising out of or related to the Policies and shall thereafter be released from any and all Policy Claims by any Person, and all of the Policies of any or all members of such Settling Insurer Group shall, upon such payment, be exhausted by payment of such Settlement Amount, and shall thereupon be null and void and of no further force or effect;

(D) all Persons are restrained and enjoined from commencing and/or continuing any suit, arbitration or other proceeding of any type or nature for Policy Claims against any or all members of the Settling Insurer Group (it being understood that cross-claims which are unrelated to Policy Claims and which are asserted by any party to JCP No. 1072 against the Settling

Insurer are excluded from this clause (D)), except that no Person who asserted prior to the date this Order becomes a Final Order a claim or cause of action against one or more of the Settling Insurer Group seeking any and all damages (other than or in addition to policy proceeds) for bad faith or other insurer misconduct alleged in connection with the handling or disposition of claims is enjoined from proceeding only with respect to such claim or cause of action; *provided, however,* that any Person who (i) asserts such a claim or cause of action where the alleged act or acts or failure or failures to act upon which such claim or cause of action is based arose after the date of this Order and/or who (ii) asserts a claim or cause of action against the Settlement Fund or files a proof of claim for, or receives, a payment under the Plan is so restrained and enjoined from commencing or continuing any such action against any or all members of the Settling Insurer Group; and

(E) upon payment by the Settling Insurer of its Settlement Amount in accordance with the terms and provisions of the Settlement Agreement, the JM Plaintiffs are authorized to dismiss, unconditionally and with prejudice (unless the Settlement Agreement shall otherwise be terminated in accordance with its terms), both of the following: (i) the claims of the JM Plaintiffs against the Settling Insurer asserted or assertable in the JM Included Action, and (ii) the JM Included Action itself.

2. IT IS HEREBY FURTHER ORDERED AND ADJUDGED AND DECREED with respect to the

Settlement Agreement dated as of March 26, 1986 between The Aetna Casualty and Surety Company, on the one hand, and Manville Corporation, et al., on the other hand, that:

2.1 *Definitions.* As used in this Paragraph and Paragraph 2.2 below, the following defined terms have the following meanings:

"Affiliate" of another Person means any Person directly or indirectly controlling, controlled by, or under common control with, such other Person. The term "controlling" (including, with correlative meaning, the terms "controlled by" or "under common control with"), as used with respect to any Person, shall mean the possession, directly or indirectly, of the power to cause the direction of the management and policies of such Person, whether through the ownership of securities, by contract or otherwise.

"Code" means the laws of the United States relating to bankruptcy or reorganization, including, without limitation, Title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.*, as amended.

"Final Order" means a judgment, order or other decree approved or entered by any State or Federal Court (including, without limitation, this Court) located in one of the States, or the District of Columbia, which judgment, order or other decree has not been reversed or stayed and as to which the time to appeal has expired and as to which no appeal, petition for rehearing or petition for certiorari is pending (or if such appeal has been filed or any such petition has been granted, it has been finally decided and such judgment, order or other decree has not been reversed or stayed).

"JCP No. 1072" means Judicial Council Proceeding No. 1072, presently pending in the Superior Court of the State of California, County of San Francisco, which includes the JM Included Action.

"JM Debtors" means John-Manville Corporation and each of its Affiliates which filed a petition for reorganization under Chapter 11 of the Code with this Court on August 26, 1982, unless such corporation has had or will have a plan of reorganization confirmed by an order of this Court which is a Final Order prior to the Plan Confirmation Date.

"JM Group" means the JM Insureds and the present, former and future directors, officers and employees of one or more JM Insureds.

"JM Included Action" means that portion of JCP No. 1072 represented by the allegations and claims of the JM Plaintiffs against the Settling Insurer with respect to the Policies and the allegations and claims of the Settling Insurer against the JM Plaintiffs with respect to the Policies.

"JM Insureds" means Manville Corporation, the JM Plaintiffs and each other Person (except natural persons) who was or is an Affiliate of Manville Corporation or Johns-Manville Corporation.

"JM Plaintiffs" means Johns-Manville Corporation, Johns-Manville Sales Corporation, Johns-Manville International Corporation, Johns-Manville Canada Inc. (now known as JM Asbestos Inc.) and Johns-Manville Amiante Canada Inc. (now known as JM Asbestos Inc.), each of which is a named plaintiff in JCP No. 1072.

"Person" means an individual, a corporation, a partnership, an association, a trust or any other entity or organization, including, without limitation, any government or political subdivision or an agency or instrumentality thereof.

"Plan" means the First Amended and Restated Plan of Reorganization, dated February 14, 1986, of the JM Debtors, as filed with this Court on February 14, 1986, and as amended, modified or superseded from time to time, in the form in which it is confirmed by a Final Order of this Court.

"Plan Confirmation Date" means the date on which the Plan Confirmation Order becomes a Final Order.

"Plan Confirmation Order" means the order entered by this Court confirming the Plan.

"Policies" mean the following insurance policies (and only the following insurance policies) issued by the Settling Insurer to the JM Insureds:

Policy Number	Policy Periods (for information only)
01 XN 1913 WCA	7/01/78 - 7/01/79
01 XN 2284 WCA	7/01/79 - 7/01/80

"Policy Claims" means any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be, asserted by any Person against any or all members of the JM Group or against any or all members of the Settling Insurer Group based upon, arising out of or relating to the Policies.

"Settlement Agreement" means the Settlement Agreement dated as of March 26, 1986, between

the Settling Insurer, on the one hand, and Manville Corporation, et al., on the other hand.

"Settlement Amount" means Five Million Eight Hundred Thousand Dollars ($5,800,000).

"Settlement Fund" means the Settlement Amount upon deposit with (or in accordance with the written instructions of) the Clerk of this Court in accordance with the provisions of Paragraph 2 of the Settlement Agreement, and all investment income thereon and gains or losses attributable thereto after any such deposit.

"Settling Insurer" means The Aetna Casualty and Surety Company.

"Settling Insurer Group" means the Settling Insurer and each of its present, former and future directors, officers, and employees.

Where the context so requires, each defined term stated in a singular form shall include the plural form, and each defined term stated in a plural form shall include the singular form.

2.2 *Orders.*

(A) The disposition of the Settlement Fund is subject to the jurisdiction and further order of this Court;

(B) any and all claims, charges or encumbrances which might otherwise have been assessable or assertable by any Person against or with respect to the JM Group's rights and interests based upon, arising out of or related to any or all of the Policies, and any and all claims or causes of action in law, equity, admiralty or otherwise based upon, arising out of, or related to any or all of the Policies or which were or are assessable or assertable by any Person against any or all of the

Policies or any or all members of the Settling Insurer Group, are transferred, and shall attach, solely to the Settlement Fund;

(C) upon payment by the Settling Insurer of its Settlement Amount in accordance with the terms and provisions of the Settlement Agreement, the Settling Insurer and its Settling Insurer Group shall have no further duties or obligations based upon, arising out of or related to the Policies and shall thereafter be released from any and all Policy Claims by any Person, and all of the Policies of any or all members of such Settling Insurer Group shall, upon such payment, be exhausted by payment of such Settlement Amount, and shall thereupon be null and void and of no further force or effect;

(D) all Persons are restrained and enjoined from commencing and/or continuing any suit, arbitration or other proceeding of any type or nature for Policy Claims against any or all members of the Settling Insurer Group (it being understood that cross-claims which are unrelated to Policy Claims and which are asserted by any party to JCP No. 1072 against the Settling Insurer are excluded from this clause (D)), except that no Person who asserted prior to the date this Order becomes a Final Order a claim or cause of action against one or more of the Settling Insurer Group seeking any and ail damages (other than or in addition to policy proceeds) for bad faith or other insurer misconduct alleged in connection with the handling or disposition of claims is enjoined from proceeding only with respect to such claim or cause of action; *provided*,

however, that any Person who (i) asserts such a claim or cause of action where the alleged act or acts or failure or failures to act upon which such claim or cause of action is based arose after the date of this Order and/or who (ii) asserts a claim or cause of action against the Settlement Fund or files a proof of claim for, or receives, a payment under the Plan is so restrained and enjoined from commencing or continuing any such action against any or all members of the Settling Insurer Group; and

(E) upon payment by the Settling Insurer of its Settlement Amount in accordance with the terms and provisions of the Settlement Agreement, the JM Plaintiffs are authorized to dismiss, unconditionally and with prejudice (unless the Settlement Agreement shall otherwise be terminated in accordance with its terms), both of the following: (i) the claims of the JM Plaintiffs against the Settling Insurer asserted or assertable in the JM Included Action, and (ii) the JM Included Action itself.

3. IT IS HEREBY FURTHER ORDERED AND ADJUDGED AND DECREED with respect to the Settlement Agreement dated as of October 7, 1986 between AIU Insurance Company, Granite State Insurance Company, Lexington Insurance Company and National Union Fire Insurance Company of Pittsburgh, PA, on the one hand, and Manville Corporation, et al., on the other hand, that:

3.1 *Definitions.* As used in this Paragraph and Paragraph 3.2 below, the following defined terms have the following meanings:

"Affiliate" of another Person means any Person directly or indirectly controlling, controlled by, or under common control with, such other Person. The term "controlling" (including, with correlative meaning, the terms "controlled by" or "under common control with"), as used with respect to any Person, shall mean the possession, directly or indirectly, of the power to cause the direction of the management and policies of such Person, whether through the ownership of securities, by contract or otherwise.

"Bond" means the Bond, dated October 8, 1986, issued by American Home Assurance company in favor of Manville Corporation and the JM Plaintiffs in connection with the Settlement Agreement.

"Dismissal Agreement" means the "Agreement for Dismissal of Litigation in Contemplation of Settlement" dated as of October 7, 1986, between the JM Plaintiffs and the Settling Insurers with respect to the JM Included Action.

"Final Order" means a judgment, order or other decree approved or entered by any State or Federal Court (including, without limitation, this Court) located in one of the States, or the District of Columbia, which judgment, order or other decree has not been reversed or stayed and as to which the time to appeal has expired and as to which no appeal, petition for rehearing or petition for certiorari is pending (or if such appeal has been filed or any such petition has been granted, it has been finally decided and such judgment, order or other decree has not been reversed or stayed).

"JCP No. 1072" means Judicial Council Proceeding No. 1072, presently pending in the Supe-

rior Court of the State of California, City and County of San Francisco, which includes the JM Included Action.

"JM Group" means the JM Insureds and the present, former and future directors, officers and employees of each of one or more JM Insureds.

"JM Included Action" means that portion of JCP No. 1072 represented by the allegations and claims of the JM Plaintiffs against the Settling Insurers with respect to the Policies and the allegations and claims of the Settling Insurers against the JM Plaintiffs with respect to the Policies.

"JM Insureds" means Manville Corporation, the JM Plaintiffs and each other Person (except natural persons) who is an Affiliate of Manville Corporation or Johns-Manville Corporation.

"JM Plaintiffs" means Johns-Manville Corporation, Johns-Manville Sales Corporation (now known as Manville Sales Corporation), Johns-Manville International Corporation, Johns-Manville Canada Inc. (now known as JM Asbestos Inc.) and Johns-Manville Amiante Canada Inc. (now known as JM Asbestos Inc.), each of which is a named plaintiff in JCP No. 1072.

"Person" means an individual, a corporation, a partnership, an association, a trust or any other entity or organization, including, without limitation, any government or political subdivision or an agency or instrumentality thereof.

"Plan" means the revised form of the Second Amended and Restated Plan of Reorganization of Manville Corporation dated May 23, 1986, as filed with this Court on June 4, 1986, and as

amended, modified or superseded from time to time, in the form in which it is confirmed by a Final Order of this Court.

"Plan Confirmation Order" means the order entered by this Court confirming the Plan.

"Policies" means the following insurance policies (and only the following insurance policies) issued by the Settling Insurers to the JM Insureds:

Policy Number	Policy Periods (for information only)
Issued by AIU Insurance Company:	
75 100718	7/01/78 - 7/01/79
75 100719	7/01/78 - 7/01/79
75 101097	7/01/79 - 7/01/80
75 101098	7/01/79 - 7/01/80
Issued by Granite State Insurance Company:	
80 93032	7/01/76 - 7/01/77
80 93033	7/01/76 - 7/01/77
80 93260	7/01/77 - 7/01/78
80 93261	7/01/77 - 7/01/78
6179 1514	7/01/79 - 7/01/80
Issued by Lexington Insurance Company:	
GC 550 4610	7/01/75 - 7/01/76
GC 550 3055	7/01/76 - 7/01/77
GC 550 6117	7/01/77 - 7/01/78
551 1324	7/01/78 - 7/01/79
551 1483	7/01/79 - 7/01/80
Issued by National Union Fire Insurance Company of Pittsburgh, PA:	

Policy Number	Policy Periods (for information only)
118 5191	7/01/76 - 7/01/77
122 8559	7/01/77 - 7/01/78
122 8560	7/01/77 - 7/01/78
122 8561	7/01/77 - 7/01/78
123 1971	7/01/78 - 7/01/79
978 2326	7/01/79 - 7/01/80

"Policy Claims" means any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be, asserted by any Person against any or all members of the JM Group or against any or all members of the Settling Insurer Group based upon, arising out of or relating to the Policies.

"Policyholder Releases" means the releases to be executed by Manville Corporation on behalf of itself and each other JM Insured and their respective successors and assigns and by each of the JM Plaintiffs on behalf of itself and its successors and assigns, in substantially the form attached to the Settlement Agreement as Exhibit B.

"Settlement Agreement" means the Settlement Agreement dated as of October 7, 1986, between the Settling Insurers, on the one hand, and Manville Corporation, et al., on the other hand.

"Settlement Amount" means Forty-Four Million Four Hundred Thousand Dollars ($44,400,000).

"Settlement Fund" means the Settlement Amount, together with any amounts paid by the Settling Insurers pursuant to Paragraph 5 of the Settlement Agreement, upon deposit of such amounts with (or in accordance with the written

instructions of) the Clerk of this Court in accordance with the provisions of Paragraph 2 of the Settlement Agreement, and all investment income thereon and gains or losses attributable thereto after any such deposit.

"Settling Insurer" means any one of (i) AIU Insurance Company, (ii) Granite State Insurance Company, (iii) Lexington Insurance Company, and (iv) National Union Fire Insurance Company of Pittsburgh, PA.

"Settling Insurer Group" means the Settling Insurers and each of their respective present and former Affiliates and present, former and future directors, officers, and employees. The "Settling Insurer Group" of a Settling Insurer means the Settling Insurer and its present and former Affiliates and its present, former and future directors, officers and employees.

"Settling Insurer Release" means a release executed by a Settling Insurer on behalf of itself and its successors and assigns, substantially in the form attached to the Settlement Agreement as Exhibit C.

Where the context so requires, each defined term stated in a singular form shall include the plural form, and each defined term stated in a plural form shall include the singular form.

3.2 *Orders.*

(A) The disposition of the Settlement Fund and the resolution of all disputes concerning the interpretation and enforcement of this Settlement Agreement, the Dismissal Agreement, the Bond, the Policyholder Releases and the Settling

Insurer Releases are subject to the jurisdiction and further order of this Court;

(B) unless and until the Settlement Agreement terminates, any and all claims, charges or encumbrances which might otherwise have been assessable or assertable by any Person against or with respect to the JM Group's rights and interests based upon, arising out of or related to the Policies, and any and all claims or causes of action in law, equity, admiralty or otherwise based upon, arising out of, or related to the Policies or which were or are assessable or assertable by any Person against the Policies or any or all members of the Settling Insurer Group, are transferred, and shall attach, solely to the Settlement Fund;

(C) unless and until the Settlement Agreement terminates, upon payment by the Settling Insurers of the Settlement Amount in accordance with the terms and provisions of the Settlement Agreement, the Settling Insurers and the Settling Insurer Group shall have no further duties or obligations based upon, arising out of or related to the Policies (including but not limited to excess worker's compensation liability, property damage liability, general liability and any and all other liability), and shall thereafter be released from any and all Policy Claims by any Person, and the Policies shall, upon such payment, be exhausted by payment of the Settlement Amount and shall thereupon be null and void and of no further force or effect;

(D) unless and until the Settlement Agreement terminates, all Persons are restrained and

enjoined from commencing and/or continuing any suit, arbitration or other proceeding of any type or nature with respect to Policy Claims against any or all members of the Settling Insurer Group (it being understood that cross-claims which are unrelated to Policy Claims and which are asserted by any party to JCP No. 1072 against the Settling Insurers are excluded from this clause (D)), except that no Person who asserted prior to the date this Order becomes a Final Order a claim or cause of action against one or more of the Settling Insurer Group seeking any and all damages (other than or in addition to policy proceeds) for bad faith or other insurer misconduct alleged in connection with the handling or disposition of claims is enjoined from proceeding only with respect to such claim or cause of action; *provided, however,* that any Person who (i) asserts such a claim or cause of action where the alleged act or acts or failure or failures to act upon which such claim or cause of action is based arose after the date of this Order and/or who (ii) asserts a claim or cause of action against the Settlement Fund or files a proof of claim for, or receives, a payment under the Plan is so restrained and enjoined from commencing or continuing any such action against any or all members of the Settling Insurer Group;

(E) upon, payment of the Settlement Amount in accordance with the terms and provisions of the Settlement Agreement, Manville Corporation and the JM Plaintiffs shall execute and deliver the Policyholder Releases to the Settling Insurers as provided in Paragraph 2(c)(ii) of the Settlement Agreement; and

(F) upon payment of the Settlement Amount in accordance with the terms and provisions of the Settlement Agreement, the JM Plaintiffs are authorized to dismiss, unconditionally and with prejudice (unless the Settlement Agreement shall otherwise be terminated in accordance with its terms), both of the following: (i) the claims of the JM Plaintiffs against the Settling Insurers asserted or assertable in the JM Included Action, and (ii) the JM Included Action itself.

4. IT IS HEREBY FURTHER ORDERED AND ADJUDGED AND DECREED with respect to the Settlement Agreement dated as of May 12, 1986, between American Re-Insurance Company, on the one hand, and Manville Corporation, et al., on the other hand, that:

4.1 *Definitions.* As used in this Paragraph and Paragraph 4.2 below, the following defined terms have the following meanings:

"Affiliate" of another Person means any Person directly or indirectly controlling, controlled by, or under common control with, such other Person. The term "controlling" (including, with correlative meaning, the terms "controlled by" or "under common control with"), as used with respect to any Person, shall mean the possession, directly or indirectly, of the power to cause the direction of the management and policies of such Person, whether through the ownership of securities, by contract or otherwise.

"Code" means the laws of the United States relating to bankruptcy or reorganization, including, without limitation, Title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.*, as amended.

"Final Order" means a judgment, order or other decree approved or entered by any State or Federal Court (including, without limitation, this Court) located in one of the States, or the District of Columbia, which judgment, order or other decree has not been reversed or stayed and as to which the time to appeal has expired and as to which no appeal, petition for rehearing or petition for certiorari is pending (or if such appeal has been filed or any such petition has been granted, it has been finally decided and such judgment, order or other decree has not been reversed or stayed).

"JCP No. 1072" means Judicial Council Proceeding No. 1072, presently pending in the Superior Court of the State of California, City and County of San Francisco, which includes the JM Included Action.

"JM Debtors" means Johns-Manville Corporation and each of its Affiliates which filed a petition for reorganization under Chapter 11 of the Code with this Court on August 26, 1982, unless such corporation has had or will have a plan of reorganization confirmed by an order of this Court which is a Final Order prior to the Plan Confirmation Date.

"JM Group" means the JM Insureds and the present, former and future directors, officers and employees of each of one or more JM Insureds.

"JM Included Action" means that portion of JCP No. 1072 represented by the allegations and claims of the JM Plaintiffs against the Settling Insurer with respect to the Policies and the allegations and claims of the Settling Insurer against the JM Plaintiffs with respect to the Policies.

"JM Insureds" means Manville Corporation, the JM Plaintiffs and each other Person (except natural persons) who was or is an Affiliate of Manville Corporation or Johns-Manville Corporation.

"JM Plaintiffs" means Johns-Manville Corporation, Johns-Manville Sales Corporation (now known as Manville Sales Corporation), Johns-Manville International Corporation, Johns-Manville Canada Inc. (now known as JM Asbestos Inc.) and Johns-Manville Amiante Canada Inc. (now known as JM Asbestos Inc.), each of which is a named plaintiff in JCP No. 1072.

"Person" means an individual, a corporation, a partnership, an association, a trust or any other entity or organization, including, without limitation, any government or political subdivision or an agency or instrumentality thereof.

"Plan" means the First Amended and Restated Plan of Reorganization dated February 14, 1986, of the JM Debtors, as filed with this Court on February 14, 1986, and as amended, modified or superseded from time to time, in the form in which it is confirmed by a Final Order of this Court.

"Plan Confirmation Date" means the date on which the Plan Confirmation Order becomes a Final Order.

"Plan Confirmation Order" means the order entered by this Court confirming the Plan.

"Policies" means the following insurance policies (and only the following insurance policies) issued by the Settling Insurer to the JM Insureds:

Policy Number	Policy Periods (for information only)
M1050173	7/1/76 - 7/1/77
M1665370	7/1/77 - 7/1/78
EUR4000021	7/1/78 - 7/1/79

"Policy Claims" means any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be, asserted by any Person against any or all members of the JM Group or against any or all members of the Settling Insurer Group based upon, arising out of or relating to the Policies.

"Settlement Agreement" means the Settlement Agreement dated as of May 12, 1986, between the Settling Insurer, on the one hand, and Manville Corporation, et al., on the other hand.

"Settlement Amount" means Three Million Two Hundred Thousand Dollars ($3,200,000).

"Settlement Fund" means the Settlement Amount upon its deposit with (or in accordance with the written instructions of) the Clerk of this Court in accordance with the provisions of Paragraph 2 of the Settlement Agreement, and all investment income thereon and gains or losses attributable thereto after any such deposit.

"Settling Insurer" means American Re-Insurance Company.

"Settling Insurer Group" means the Settling Insurer and its present, former and future directors, officers, and employees.

Where the context so requires, each defined term stated in a singular form shall include the

plural form, and each defined term stated in a plural form shall include the singular form.

4.2 *Orders.*

(A) Unless and until the Settlement Agreement terminates, the disposition of the Settlement Fund is subject to the jurisdiction and further order of this Court;

(B) any and all claims, charges or encumbrances which might otherwise have been assessable or assertable by any Person against or with respect to the JM Group's rights and interests based upon, arising out of or related to the Policies, and any and all claims or causes of action in law, equity, admiralty or otherwise based upon, arising out of, or related to the Policies or which were or are assessable or assertable by any Person against the Policies or any or all members of the Settling Insurer Group, are transferred, and shall attach, solely to the Settlement Fund;

(C) upon payment of the Settlement Amount in accordance with the terms and provisions of the Settlement Agreement, the Settling Insurer and its Settling Insurer Group shall have no further duties or obligations based upon, arising out of or related to the Policies and shall thereafter be released from any and all Policy Claims by any Person, and the Policies shall, upon such payment, be exhausted by payment of such Settlement Amount and shall thereupon be null and void and of no further force or effect;

(D) unless and until the Settlement Agreement terminates, all Persons are restrained and enjoined from commencing and/or continuing any

suit, arbitration or other proceeding of any type or nature with respect to Policy Claims against any or all members of the Settling Insurer Group (it being understood that cross-claims which are unrelated to Policy Claims and which are asserted by any party to JCP No. 1072 against the Settling Insurer are excluded from this clause (D)), except that no Person who asserted prior to the date this order becomes a Final Order a claim or cause of action against one or more of the Settling Insurer Group seeking any and all damages (other than or in addition to policy proceeds) for bad faith or other insurer misconduct alleged in connection with the handling or disposition of claims is enjoined from proceeding only with respect to such claim or cause of action; *provided, however,* that any person or entity who (i) asserts such a claim or cause of action where the alleged act or acts or failure or failures to act upon which such claim or cause of action is based arose after the date of this Order and/or who (ii) asserts a claim or cause of action against the Settlement Fund or files a proof of claim for, or receives, a payment under the Plan is so restrained and enjoined from commencing or continuing any such action against any or all members of the Settling Insurer Group; and

(E) upon payment of the Settlement Amount in accordance with the terms and provisions of the Settlement Agreement, the JM Plaintiffs are authorized to dismiss, unconditionally and with prejudice (unless the Settlement Agreement shall otherwise be terminated in accordance with its terms), both of the following: (i) the claims of the

JM Plaintiffs against the Settling Insurer asserted or assertable in the JM Included Action, and (ii) the JM Included Action itself.

5. IT IS HEREBY FURTHER ORDERED AND ADJUDGED AND DECREED with respect to the Settlement Agreement dated as of September 26, 1986, between Centaur Insurance Company, on the one hand, and Manville Corporation, et al., on the other hand, that:

5.1 *Definitions.* As used in this Paragraph and Paragraph 5.2 below, the following defined terms have the following meanings:

"Affiliate" of another Person means any Person directly or indirectly controlling, controlled by, or under common control with, such other Person, but shall not include any governmental entity. As used herein, the term "governmental entity" shall include, but shall not be limited to, any municipal, local, state or federal liquidator, rehabilitator, or department of insurance. The term "controlling" (including, with correlative meaning, the terms "controlled by" or "under common control with"), as used with respect to any Person, shall mean the possession, directly or indirectly, of the power to cause the direction of the management and policies of such Person, whether through the ownership of securities, by contract or otherwise.

"Bonds" means the U.S. Treasury-backed zero coupon bonds, commonly known as "CATS" bonds, with a maturity date of February 15, 1989, and having an aggregate face value at maturity of $500,000, transferred to the Trust pursuant to Paragraph 2(a) of the Settlement Agreement.

"Final Order" means a judgment, order or other decree approved or entered by any State or Federal Court (including, without limitation, this Court) located in one of the States, or the District of Columbia, which judgment, order or other decree has not been reversed or stayed and as to which the time to appeal has expired and as to which no appeal, petition for rehearing or petition for certiorari is pending (or if such appeal has been filed or any such petition has been granted, it has been finally decided and such judgment, order or other decree has not been reversed or stayed).

"JCP No. 1072" means Judicial Council Proceeding No. 1072, presently pending in the Superior Court of the State of California, City and County of San Francisco, which includes the JM Included Action.

"JM Group" means the JM Insureds and the present, former and future directors, officers and employees of each of one or more of the JM Insureds.

"JM Included Action" means that portion of JCP No. 1072 represented by the allegations and claims of the JM Plaintiffs against the Settling Insurer with respect to the Policy and the allegations and claims of the Settling Insurer against the JM Plaintiffs with respect to the Policy.

"JM Insureds" means Manville Corporation, the JM Plaintiffs and each other Person (except natural persons) who is an Affiliate of Manville Corporation or Johns-Manville Corporation.

"JM Plaintiffs" means Johns-Manville Corporation, Johns-Manville Sales Corporation (now

known as Manville Sales Corporation), Johns-Manville International Corporation, Johns-Manville Canada Inc. (now known as JM Asbestos Inc.) and Johns-Manville Amiante Canada Inc. (now known as JM Asbestos Inc.), each of which is a named plaintiff in JCP No. 1072.

"Person" means an individual, a corporation, a partnership, an association, a trust or any other entity or organization, including, without limitation, any government or political subdivision or an agency or instrumentality thereof.

"Plan" means the revised form of the Second Amended and Restated Plan of Reorganization of Manville Corporation, dated May 23, 1986, as filed with this Court on June 4, 1986, and as amended, modified or superseded from time to time, in the form in which it is confirmed by a Final Order of this Court.

"Plan Confirmation Order" means the order entered by this Court confirming the Plan.

"Policy" means policy number CU 00203 (policy period July 1, 1979 - July 1, 1980) issued by the Settling Insurer to the JM Insureds.

"Policy Claims" means any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be, asserted by any Person against any or all members of the JM Group or against any or all members of the Settling Insurer Group based upon, arising out of or relating to the Policy.

"Settlement Agreement" means the Settlement Agreement dated as of September 26, 1986, between the Settling Insurer, on the one hand, and Manville Corporation, et al., on the other hand.

"Settlement Fund" means the Trust Property upon its deposit with (or in accordance with the written instructions of) the Clerk of this Court in accordance with the provisions of Paragraph 2 of the Settlement Agreement, and all investment income thereon and gains or losses attributable thereto after any such deposit.

"Settling Insurer" means the Centaur Insurance Company.

"Settling Insurer Group" means the Settling Insurer and its present, former and future directors, officers, and employees.

"Trust" means the trust established pursuant to Paragraphs 2(a) and 9 of the Settlement Agreement and administered pursuant to the Trust Agreement.

"Trustee" means Mellon Bank, N.A., a national banking association, the trustee under the Trust Agreement, and any successor thereto.

"Trust Agreement" means the Trust Agreement dated as of September 26, 1986, among the parties to the Settlement Agreement and the Trustee with respect to the terms and provisions governing the administration of the Trust.

"Trust Property" means (i) the Bonds, upon their transfer to the Trust, and any proceeds of the Bonds obtained by the Trustee, whether following maturity of the Bonds or otherwise; (ii) cash in the amount of $6,000 upon the transfer of such cash to the Trust as provided in Paragraph 2(a) of the Settlement Agreement; (iii) any amounts received by the Trust pursuant to Paragraphs 5(b) or 5(c) of the Settlement Agreement; and (iv) all gain and interest and other yield on the foregoing and the proceeds thereof; *provided,*

however, that "Trust Property" shall not include any of the foregoing to the extent that it is released to the Settling Insurer pursuant to Section 4(d) of the Trust Agreement.

Where the context so requires, each defined term stated in a singular form shall include the plural form, and each defined term stated in a plural form shall include the singular form.

5.2 *Orders.*

(A) The disposition of the Settlement Fund is subject to the jurisdiction and further order of this Court;

(B) unless and until the Settlement Agreement terminates, any and all claims, charges or encumbrances which might otherwise have been assessable or assertable by any Person against or with respect to the JM Group's rights and interests based upon, arising out of or related to the Policy, and any and all claims or causes of action in law, equity, admiralty or otherwise based upon, arising out of, or related to the Policy or which were or are assessable or assertable by any Person against the Policy or any or all members of the Settling Insurer Group, are transferred, and shall attach, solely to the Settlement Fund;

(C) unless and until the Settlement Agreement terminates, the Settling Insurer and its Settling Insurer Group shall have no further duties or obligations based upon, arising out of or related to the Policy and shall hereafter be released from any and all Policy Claims by any Person, and the Policy shall be exhausted by delivery by the Trustee of the Trust Property to the Clerk of this

Court and shall thereupon be null and void and of no further force or effect;

(D) unless and until the Settlement Agreement terminates, all Persons are restrained and enjoined from commencing and/or continuing any suit, arbitration or other proceeding of any type or nature with respect to Policy Claims against any or all members of the Settling Insurer Group (it being understood that cross-claims which are unrelated to Policy Claims and which are asserted by any party to JCP No. 1072 against the Settling Insurer are excluded from this clause (D)), except that no Person who asserted prior to the date this Order becomes a Final Order a claim or cause of action against one or more of the Settling Insurer Group seeking any and all damages (other than or in addition to policy proceeds) for bad faith or other insurer misconduct alleged in connection with the handling or disposition of claims is enjoined from proceeding only with respect to such claim or cause of action; *provided, however,* that any Person who (i) asserts such a claim or cause of action where the alleged act or acts or failure or failures to act upon which such claim or cause of action is based arose after the date of this Order and/or who (ii) asserts a claim or cause of action against the Settlement Fund or files a proof of claim for, or receives, a payment under the Plan is so restrained and enjoined from commencing or continuing any such action against any or all members of the Settling Insurer Group; and

(E) upon delivery by the Trustee of the Trust Property to (or in accordance with the written

instructions of) the Clerk of this Court in accordance with the terms and provisions of the Settlement Agreement, the JM Plaintiffs are authorized to dismiss, unconditionally and with prejudice (unless the Settlement Agreement shall otherwise be terminated in accordance with its terms), both of the following: (i) the claims of the JM Plaintiffs against the Settling Insurer asserted or assertable in the JM Included Action, and (ii) the JM Included Action itself.

6. IT IS HEREBY FURTHER ORDERED AND ADJUDGED AND DECREED with respect to the Settlement Agreement dated as of October 20, 1986, between Commercial Union Insurance Company and the Northern Assurance Company of America, on the one hand, and Manville Corporation, et al., on the other hand, that:

6.1 *Definitions.* As used in this Paragraph and Paragraph 6.2 below, the following defined terms have the following meanings:

"Affiliate" of another Person means any Person directly or indirectly controlling, controlled by, or under common control with, such other Person. The term "controlling" (including, with correlative meaning, the terms "controlled by" or "under common control with"), as used with respect to any Person, shall mean the possession, directly or indirectly, of the power to cause the direction of the management and policies of such Person, whether through the ownership of securities, by contract or otherwise.

"Boston Action" means Adversary Proceeding No. 82-1390, currently pending in the United States Bankruptcy Court for the District of

Massachusetts, originally filed as Civil Action No. 39329 in the Superior Court Department of the Commonwealth of Massachusetts in and for the County of Suffolk, in whatever forum it may hereafter reside.

"JCP No. 1072" means Judicial Council Proceeding No. 1072, presently pending in the Superior Court of the State of California, City and County of San Francisco, which includes the JM Included Action.

"JM Defendants" means Johns-Manville Corporation, Johns-Manville Sales Corporation (now known as Manville Sales Corporation) and Johns-Manville International Corporation, each of which is a named defendant in the Boston Action.

"JM Group" means the JM Insureds and the present, former and future directors, officers and employees of each of one or more JM Insureds.

"JM Included Action" means that portion of JCP No. 1072 represented by the allegations and claims of the JM Plaintiffs against the Settling Insurers (or either of them) with respect to the Policies and the allegations and claims of the Settling Insurers (or either of them) against the JM Plaintiffs with respect to the Policies.

"JM Insureds" means Manville Corporation, the JM Plaintiffs and each other Person (except natural persons) who is an Affiliate of Manville Corporation or Johns-Manville Corporation.

"JM Plaintiffs" means Johns-Manville Corporation, Johns-Manville Sales Corporation (now known as Manville Sales Corporation), Johns-Manville International Corporation, Johns-Manville Canada Inc. (now known as JM Asbestos Inc.) and Johns-Manville Amiante

Canada Inc. (now known as JM Asbestos Inc.), each of which is a named plaintiff in JCP No. 1072.

"Person" means an individual, a corporation, a partnership, an association, a trust or any other entity or organization, including, without limitation, any government or political subdivision or an agency or instrumentality thereof.

"Policies" means the following insurance policies issued by the Settling Insurers (or either of them) to the JM Insureds:

Policies	Policy Periods (for information only)
All insurance policies as determined by the jury in Phase I of JCP No. 1072, as set forth on Exhibit G-1 attached to the Settlement Agreement	1/1/34-7/1/45
0-312500	7/1/45-7/1/48
0-312501	7/1/45-7/1/48
0-334350	7/1/46-7/1/49
0-334351	7/1/46-7/1/51
S-10497 (on policy form ES9024-1, as determined by the jury in Phase I of JCP No. 1072, as set forth on Exhibit G-2 attached to the Settlement Agreement)	7/1/60-7/1/63

Policies	Policy Periods (for information only)
E16 8232-001	3/18/66-7/1/69
E16 8232-002	3/18/66-7/1/69
EY 8232-004	7/1/69-7/1/72
EY 8232-005	7/1/69-7/1/72

"Policy Claims" means any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be, asserted by any Person against any or all members of the JM Group or against any or all members of the Settling Insurer Group based upon, arising out of or relating to the Policies.

"Settlement Agreement" means the Settlement Agreement dated as of October 20, 1986, between the Settling Insurers, on the one hand, and Manville Corporation, et al., on the other hand.

"Settlement Amount" means Twenty-Seven Million One Hundred Thousand Dollars (U.S. $27,100,000), consisting of four installment payments as described in the Settlement Agreement.

"Settlement Fund" means the Settlement Amount, together with any amounts paid by the Settling Insurers pursuant to Paragraph 5 of the Settlement Agreement, upon deposit of such amounts with (or in accordance with the written instructions of) the Clerk of this Court in accordance with the provisions of the Settlement Agreement, and all investment income thereon and gains or losses attributable thereto after any such deposit.

"Settling Insurers" means Commercial Union Insurance Company, a Massachusetts corpora-

tion and the successor by merger to The Employers' Liability Assurance Corporation, Ltd.; and The Northern Assurance Company of America, a Vermont corporation and the successor to the obligations of The Employers' Surplus Lines Insurance Company (now known as Falcon Insurance Company) under Policy No. S-10497.

"Settling Insurer Group" means the Settling Insurers and each of their respective present and former Affiliates and present, former and future directors, officers, and employees.

Where the context so requires, each defined term stated in a singular form shall include the plural form, and each defined term stated in a plural form shall include the singular form.

6.2 *Orders.*

(A) The disposition of the Settlement Fund is subject to the jurisdiction and further order of this Court;

(B) unless and until the Settlement Agreement terminates, any and all claims, charges or encumbrances which might otherwise have been assessable or assertable by any Person against or with respect to the JM Group's rights and interests based upon, arising out of or related to the Policies, and any and all claims or causes of action in law, equity, admiralty or otherwise based upon, arising out of, or related to the Policies or which were or are assessable or assertable by any Person against the Policies or any or all members of the Settling Insurer Group, are transferred, and shall attach, solely to the Settlement Fund;

(C) unless and until the Settlement Agreement terminates, upon payment by the Settling Insurers of the Settlement Amount in accordance with the terms and provisions of the Settlement Agreement, the Settling Insurers and their Settling Insurer Group shall have no duties or obligations based upon, arising out of or related to the Policies and shall thereafter be released from any and all Policy Claims by any Person, and the Policies shall, upon such payment, be deemed exhausted by payment of such Settlement Amount and shall thereupon be null and void and of no further force or effect;

(D) unless and until the Settlement Agreement terminates, all Persons are restrained and enjoined from commencing and/or continuing any suit, arbitration or other proceeding of any type or nature with respect to Policy Claims against any or all members of the Settling Insurer Group (it being understood that cross-claims which are unrelated to Policy Claims and which are asserted by any party to JCP No. 1072 against the Settling Insurers (or either of them) are excluded from this clause (D)); and

(E) upon payment of the Settlement Amount in accordance with the terms and provisions of the Settlement Agreement, the JM Plaintiffs are authorized to dismiss, unconditionally and with prejudice (unless the Settlement Agreement shall otherwise be terminated in accordance with its terms), all of the following: (i) the claims of the JM Plaintiffs and/or the JM Defendants against the Settling Insurers (or either of them) asserted or assertable in either the JM Included Action or

the Boston Action, and (ii) the JM Included Action itself.

7. IT IS HEREBY FURTHER ORDERED AND ADJUDGED AND DECREED with respect to the Settlement Agreement dated as of October 21, 1986, between First State Insurance Company, on the one hand, and Manville Corporation, et al., on the other hand, that:

7.1 *Definitions.* As used in this Paragraph and Paragraph 7.2 below, the following defined terms have the following meanings:

"Affiliate" of another Person means any Person directly or indirectly controlling, controlled by, or under common control with, such other Person. The term "controlling" (including, with correlative meaning, the terms "controlled by" or "under common control with"), as used with respect to any Person, shall mean the possession, directly or indirectly, of the power to cause the direction of the management and policies of such Person, whether through the ownership of securities, by contract or otherwise.

"JCP No. 1072" means Judicial Council Proceeding No. 1072, presently pending in the Superior Court of the State of California, City and County of San Francisco, which includes the JM Included Action.

"JM Group" means the JM Insureds and the present, former and future directors, officers and employees of each of one or more of the JM Insureds.

"JM Included Action" means that portion of JCP No. 1072 represented by the allegations and claims of the JM Plaintiffs against the Settling

Insurer with respect to the Policy and the allegations and claims of the Settling insurer against the JM Plaintiffs with respect to the Policy.

"JM Insureds" means Manville Corporation, the JM Plaintiffs and each other Person (except natural persons) who is an Affiliate of Manville Corporation or Johns-Manville Corporation.

"JM Plaintiffs" means Johns-Manville Corporation, Johns-Manville Sales Corporation (now known as Manville Sales Corporation), Johns-Manville International Corporation, Johns-Manville Canada Inc. (now known as JM Asbestos Inc.) and Johns-Manville Amiante Canada Inc. (now known as JM Asbestos Inc.), each of which is a named plaintiff in JCP No. 1072.

"Person" means an individual, a corporation, a partnership, an association, a trust or any other entity or organization, including, without limitation, any government or political subdivision or an agency or instrumentality thereof.

"Policy" means policy number 922992 (policy period 7/01/76 - 7/01/77) issued by the Settling Insurer to the JM Insureds.

"Policy Claims" means any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be, asserted by any Person against any or all members of the JM Group or against any or all members of the Settling Insurer Group based upon, arising out of or relating to the Policy.

"Settlement Agreement" means the Settlement Agreement dated as of October 21, 1986, between

the Settling Insurer, on the one hand, and Manville Corporation, et al., on the other hand.

"Settlement Amount" means One Million Four Hundred Thousand U.S. Dollars (U.S. $1,400,000).

"Settlement Fund" means the Settlement Amount upon its transfer to (or in accordance with the written instructions of) the Clerk of this Court in accordance with the provisions of Paragraph 2 of the Settlement Agreement, and all investment income thereon and gains or losses attributable thereto after any such transfer.

"Settling Insurer" means First State Insurance Company.

"Settling Insurer Group" means the Settling Insurer and its present, former and future directors, officers, and employees.

Where the context so requires, each defined term stated in a singular form shall include the plural form, and each defined term stated in a plural form shall include the singular form.

7.2 *Orders.*

(A) The disposition of the Settlement Fund is subject to the jurisdiction and further order of this Court;

(B) unless and until the Settlement Agreement terminates pursuant to Paragraph 7 thereof, any and all claims, charges or encumbrances which might otherwise have been assessable or assertable by any Person against or with respect to the JM Group's rights and interests based upon, arising out of or related to the Policy, and any and all claims or causes of action in law, equity, admiralty or otherwise based upon, arising out of, or related to the Policy or which were

or are assessable or assertable by any Person against the Policy or any or all members of the Settling Insurer Group, are transferred, and shall attach, solely to the Settlement Fund;

(C) unless and until the Settlement Agreement terminates pursuant to Paragraph 7 thereof, the Settling Insurer and its Settling Insurer Group shall have no further duties or obligations based upon, arising out of or related to the Policy and shall hereafter be released from any and all Policy Claims by any Person, and the Policy shall be exhausted by the transfer of the Settlement Amount to (or in accordance with the instructions of) the Clerk of this Court and shall thereupon be null and void and of no further force or effect;

(D) unless and until the Settlement Agreement terminates pursuant to Paragraph 7 thereof, all Persons are restrained and enjoined from commencing and/or continuing any suit, arbitration or other proceeding of any type or nature with respect to Policy Claims against any or all members of the Settling Insurer Group (it being understood that cross-claims which are unrelated to Policy Claims and which are asserted by any party to JCP No. 1072 against the Settling Insurer are excluded from this clause (D)); and

(E) upon the transfer of the Settlement Amount (and any interest payable pursuant to Paragraph 2(e) of the Settlement Agreement) to (or in accordance with the written instructions of) the Clerk of this Court in accordance with the terms and provisions of the Settlement Agreement, the JM Plaintiffs are authorized to dismiss, uncondi-

tionally and with prejudice (unless the Settlement Agreement shall otherwise be terminated in accordance with its terms), both of the following: (i) the claims of the JM Plaintiffs against the Settling Insurer asserted or assertable in the JM Included Action, and (ii) the JM Included Action itself.

8. IT IS HEREBY FURTHER ORDERED AND ADJUDGED AND DECREED with respect to the Settlement Agreement dated as of March 27, 1986, between Gibraltar Casualty Company, on the one hand, and Manville Corporation, et al., on the other hand, that:

8.1 *Definitions.* As used in this Paragraph and Paragraph 8.2 below, the following defined terms have the following meanings:

"Affiliate" of another Person means any Person directly or indirectly controlling, controlled by, or under common control with, such other Person. The term "controlling" (including, with correlative meaning, the terms "controlled by" or "under common control with"), as used with respect to any Person, shall mean the possession, directly or indirectly, of the power to cause the direction of the management and policies of such Person, whether through the ownership of securities, by contract or otherwise.

"Code" means the laws of the United States relating to bankruptcy or reorganization, including, without limitation, Title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.*, as amended.

"Effective Date" means March 27, 1986.

"Final Order" means a judgment, order or other decree approved or entered by any State or Fed-

eral Court (including, without limitation, this Court) located in one of the States, or the District of Columbia, which judgment, order or other decree has not been reversed or stayed and as to which the time to appeal has expired and as to which no appeal, petition for rehearing or petition for certiorari is pending (or if such appeal has been filed or any such petition has been granted, it has been finally decided and such judgment, order or other decree has not been reversed or stayed).

"JCP No. 1072" means Judicial Council Proceeding No. 1072, presently pending in the Superior Court of the State of California, County of San Francisco, which includes the JM Included Action.

"JM Debtors" means Johns-Manville Corporation and each of its Affiliates which filed a petition for reorganization under Chapter 11 of the Code with this Court on August 26, 1982, unless such corporation has had or will have a plan of reorganization confirmed by an order of this Court which is a Final Order prior to the Plan Confirmation Date.

"JM Group" means the JM Insureds and the present, former and future directors, officers and employees of each of one or more JM Insureds.

"JM Included Action" means that portion of JCP No. 1072 represented by the allegations and claims of the JM Plaintiffs against the Settling Insurer with respect to the Policy and the allegations and claims of the Settling Insurer against the JM Plaintiffs with respect to the Policy.

"JM Insureds" means Manville Corporation, the JM Plaintiffs and each other Person (except nat-

ural persons) who was or is an Affiliate of Manville Corporation or Johns-Manville Corporation.

"JM Plaintiffs" means Johns-Manville Corporation, Johns-Manville Sales Corporation (now known as Manville Sales Corporation), Johns-Manville International Corporation, Johns-Manville Canada Inc. (now known as JM Asbestos Inc.) and Johns-Manville Amiante Canada Inc. (now known as JM Asbestos Inc.), each of which is a named plaintiff in JCP No. 1072.

"Person" means an individual, a corporation, a partnership, an association, a trust or any other entity or organization, including, without limitation, any government or political subdivision or an agency or instrumentality thereof.

"Plan" means the First Amended and Restated Plan of Reorganization, dated February 14, 1986, of the JM Debtors, as filed with this Court on February 14, 1986, and as amended, modified or superseded from time to time, in the form in which it is confirmed by a Final Order of this Court.

"Plan Confirmation Date" means the date on which the Plan Confirmation Order becomes a Final Order.

"Plan Confirmation Order" means the order entered by this Court confirming the Plan.

"Policy" means insurance policy number GMX 00179 issued by the Settling Insurer to the JM Insureds for the policy period July 1, 1979 to July 1, 1980.

"Policy Claims" means any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be,

asserted by any Person against any or all members of the JM Group or against any or all members of the Settling Insurer Group based upon, arising out of or relating to the Policy.

"Settlement Agreement" means the Settlement Agreement dated as of March 27, 1986, between the Settling Insurer, on the one hand, and Manville Corporation, et al., on the other hand.

"Settlement Amount" means One Million Nine Hundred Thirty-Seven Thousand Five Hundred Dollars ($1,937,500).

"Settlement Fund" means the Settlement Amount upon its deposit with (or in accordance with the written instructions of) the Clerk of this Court in accordance with the provisions of Paragraph 2 of the Settlement Agreement, and all investment income thereon and gains or losses attributable thereto after any such deposit.

"Settling Insurer" means Gibraltar Casualty Company.

"Settling Insurer Group" means the Settling Insurer and each of its present, former and future directors, officers, and employees.

Where the context so requires, each defined term stated in a singular form shall include the plural form, and each defined term stated in a plural form shall include the singular form.

8.2 *Orders.*

(A) The disposition of the Settlement Fund is subject to the jurisdiction and further order of this Court;

(B) unless and until the Settlement Agreement terminates, any and all claims, charges or encumbrances which might otherwise have been

assessable or assertable by any Person against or with respect to the JM Group's rights and interests based upon, arising out of or related to the Policy, and any and all claims or causes of action in law, equity, admiralty or otherwise based upon, arising out of, or related to the Policy or which were or are assessable or assertable by any Person against the Policy or any or all members of the Settling Insurer Group, are transferred, and shall attach, solely to the Settlement Fund;

(C) unless and until the Settlement Agreement terminates, upon the Effective Date, the Settling Insurer and its Settling Insurer Group shall have no duties or obligations after the Effective Date based upon, arising out of or related to the Policy (including, but not limited to, liability for excess workers compensation liability, property damage liability, general liability and any and all other liability) and shall thereafter be released from any and all Policy Claims by any Person, and the Policy shall thereafter be deemed exhausted and shall thereupon be null and void and of no further force or effect;

(D) unless and until the Settlement Agreement terminates, all Persons are restrained and enjoined from commencing and/or continuing any suit, arbitration or other proceeding of any type or nature with respect to Policy Claims against any or all members of the Settling Insurer Group (it being understood that cross-claims which are unrelated to Policy Claims and which are asserted by any party to JCP No. 1072 against the Settling Insurer are excluded from this clause (D)), except that no Person who asserted

prior to the date this Order becomes a Final Order a claim or cause of action against one or more of the Settling Insurer Group seeking any and all damages (other than or in addition to policy proceeds) for bad faith or other insurer misconduct alleged in connection with the handling or disposition of claims is enjoined from proceeding only with respect to such claim or cause of action; *provided, however,* that any Person who (i) asserts such a claim or cause of action where the alleged act or acts or failure or failures to act upon which such claim or cause of action is based arose after the date of this Order and/or who (ii) asserts a claim or cause of action against the Settlement Fund or files a proof of claim for, or receives, a payment under the Plan is so restrained and enjoined from commencing or continuing any such action against any or all members of the Settling Insurer Group; and

(E) upon payment of the Settlement Amount in accordance with the terms and provisions of the Settlement Agreement, the JM Plaintiffs are authorized to dismiss, unconditionally and with prejudice (unless the Settlement Agreement shall otherwise be terminated in accordance with its terms), both of the following: (i) the claims of the JM Plaintiffs against the Settling Insurer asserted or assertable in the JM included Action, and (ii) the JM Included Action itself.

9. IT IS HEREBY FURTHER ORDERED AND ADJUDGED AND DECREED with respect to the Settlement Agreement dated as of September 18, 1985, between Highlands Insurance Company, on the one hand, and Manville Corporation, et al., on the other hand, that:

9.1 *Definitions.* As used in this Paragraph and Paragraph 9.2-below, the following defined terms have the following meanings:

"Affiliate" of another Person means any parent organization, subsidiary organization, or any Person directly or indirectly controlling, controlled by, or under common control with, such other Person. The term "controlling" (including, with correlative meaning, the terms "controlled by" or "under common control with"), as used with respect to any Person, shall mean the possession, directly or indirectly, of the power to cause the direction of the management and policies of such Person, whether through the ownership of securities, by contract or otherwise.

"Code" means the laws of the United States relating to bankruptcy or reorganization, including, without limitation, Title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.*, as amended.

"Final Order" means a judgment, order or other decree approved or entered by any State or Federal Court (including, without limitation, this Court) located in one of the States, or the District of Columbia, which judgment, order or other decree has not been reversed or stayed and as to which the time to appeal has expired and as to which no appeal, petition for rehearing or petition for certiorari is pending (or if such appeal has been filed or any such petition has been granted, it has been finally decided and such judgment, order or other decree has not been reversed or stayed).

"JCP No. 1072" means Judicial Council Proceeding No. 1072, presently pending in the Superior Court of the State of California, County of

San Francisco, which includes the JM Included Action.

"JM Debtors" means Johns-Manville Corporation and each of its Affiliates which filed a petition for reorganization under Chapter 11 of the Code with this Court on August 26, 1982, unless such corporation has had or will have a plan of reorganization confirmed by an order of this Court which is a Final Order prior to the Plan Confirmation Date.

"JM Group" means the JM Insureds and the present, former and future directors, officers and employees of each of one or more JM Insureds.

"JM Included Action" means that portion of JCP No. 1072 represented by the allegations and claims of the JM Plaintiffs against the Settling Insurer with respect to the Policy and the allegations and claims of the Settling Insurer against the JM Plaintiffs with respect to the Policy.

"JM Insureds" means Manville Corporation, the JM Plaintiffs and each other Person (except natural persons) who was or is an Affiliate of Manville Corporation or Johns-Manville Corporation.

"JM Plaintiffs" means Johns-Manville Corporation, Johns-Manville Sales Corporation, Johns-Manville International Corporation, Johns-Manville Canada Inc. (now known as JM Asbestos Inc.) and Johns-Manville Amiante Canada Inc. (now known as JM Asbestos Inc.), each of which is a named plaintiff in JCP No. 1072.

"Person" means an individual, a corporation, a partnership, an association, a trust or any other entity or organization, including, without limi-

tation, any government or political subdivision or an agency or instrumentality thereof.

"Plan" means the Joint Plan of Reorganization, dated October 17, 1983, of the JM Debtors, as filed with the Bankruptcy Court on November 21, 1983, and as amended, modified or superseded from time to time, in the form in which it is confirmed by a Final Order of this Court.

"Plan Confirmation Date" means the date on which the Plan Confirmation Order becomes a Final Order.

"Plan Confirmation Order" means the order entered by this Court confirming the Plan.

"Policy" means insurance policy number SR 20115 (policy period July 1, 1976 - July 1, 1977) issued by the Settling Insurer to the JM Insureds.

"Policy Claims" means any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be, asserted by any Person against any or all members of the JM Group or against any or all members of the Settling Insurer Group based upon, arising out of or relating to the Policy.

"Settlement Agreement" means the Settlement Agreement dated as of September 18, 1985, between the Settling Insurer, on the one hand, and Manville Corporation, et al., on the other hand.

"Settlement Amount" means Two Million Six Hundred Thousand Dollars ($2,600,000).

"Settlement Fund" means the Settlement Amount upon its deposit with (or in accordance with the written instructions of) the Clerk of this Court in accordance with the provisions of Para-

graph 2 of the Settlement Agreement, and all investment income thereon and gains or losses attributable thereto after any such deposit.

"Settling Insurer" means the Highlands Insurance Company on behalf of itself and each of its Affiliates.

"Settling Insurer Group" means the Settling Insurer and its present or former Affiliates, and each of their present, former and future directors, officers, and employees.

Where the context so requires, each defined term stated in a singular form shall include the plural form, and each defined term stated in a plural form shall include the singular form.

9.2 *Orders.*

(A) The disposition of the Settlement Fund is subject to the jurisdiction and further order of this Court;

(B) any and all claims, charges or encumbrances which might otherwise have been assessable or assertable by any Person against or with respect to the JM Group's rights and interests based upon, arising out of or related to the Policy, and any and all claims or causes of action in law, equity, admiralty or otherwise based upon, arising out of, or related to the Policy or which were or are assessable or assertable by any Person against the Policy or any or all members of the Settling Insurer Group, are transferred, and shall attach, solely to the Settlement Fund;

(C) upon payment by the Settling insurer of its Settlement Amount in accordance with the terms and provisions of the Settlement Agreement, the

Settling Insurer and its Settling Insurer Group shall have no further duties or obligations based upon, arising out of or related to the Policy and shall thereafter be released from any and all Policy Claims by any Person, and the Policy shall, upon such payment, be exhausted by payment of such Settlement Amount and shall thereupon be null and void and of no further force or effect;

(D). all Persons are restrained and enjoined from commencing and/or continuing any suit, arbitration or other proceeding of any type or nature for Policy Claims against any or all members of the Settling Insurer Group (it being understood that cross-claims which are unrelated to Policy Claims and which are asserted by any party to JCP No. 1072 against the Settling Insurer are excluded from this clause (D)), except that no Person who asserted prior to the date this Order becomes a Final Order a claim or cause of action against one or more of the Settling Insurer Group seeking any and all damages (other than or in addition to policy proceeds) for bad faith or other insurer misconduct alleged in connection with the handling or disposition of claims is enjoined from proceeding only with respect to such claim or cause of action; *provided, however,* that any person or entity who (i) asserts such a claim or cause of action where the alleged act or acts or failure or failures to act upon which such claim or cause of action is based arose after the date of this Order and/or who (ii) asserts a claim or cause of action against the Settlement Fund or files a proof of claim for, or receives, a payment under the Plan is so restrained and

enjoined from commencing or continuing any such action against any or all members of the Settling Insurer Group; and

(E) the JM Plaintiffs are authorized to dismiss, unconditionally and with prejudice (unless the Settlement Agreement shall otherwise be terminated in accordance with its terms), both of the following: (i) the claims of the JM Plaintiffs against the Settling Insurers asserted or assertable in the JM Included Action, and (ii) the JM Included Action itself.

10. IT IS HEREBY FURTHER DETERMINED with respect to the Settlement Agreement dated as of January 29, 1985 between Insurance Company of North America, Midland Insurance Company and Allstate Insurance Company as corporate successor of Northbrook Excess & Surplus Insurance Company (formerly known as "Northbrook Insurance Company"), on the one hand, and Manville Corporation, et al., on the other hand (all capitalized terms being used as defined in Paragraph 10.1 below), that:

(1) the Settling Insurers issued or are or may be responsible for the Policies and the Policies constitute and include property of the JM Debtors' estate;

(2) serious and substantial disputes have arisen between Manville Corporation, the Settling Insurers and others concerning the availability and extent of coverage and other obligations under the Policies;

(3) on March 31, 1980, the JM Plaintiffs commenced an action in the Superior Court of the

State of California, City and County of San Francisco, against the Settling Insurers and other insurers of the JM Insureds, which action has been coordinated with other suits in JCP No. 1072;

(4) prior to the filing of the JM Debtors' petition for reorganization under Chapter 11 of the Code on August 26, 1982, lawsuits on behalf of more than 16,000 persons had been filed against the JM Group and/or its insurers, including one or more of the Settling Insurers, claiming damages for asbestos-related claims, including (but not limited to) health, personal injury or property damage claims;

(5) no fewer than 6,000 additional lawsuits would have been commenced by January 1, 1984 against the JM Group and/or its insurers, but for the provisions of 11 U.S.C. § 362(a) and the orders of this Court issued pursuant to 11 U.S.C. §§ 362(a) and 105; and

(6) the settlement provided for in the Settlement Agreement is a fair and reasonable resolution of the disputes between Manville Corporation and the JM Plaintiffs and the Settling Insurers regarding the Policies, and approval of the Settlement Agreement will materially enhance the JM Debtors' ability to successfully and effectively reorganize under Chapter 11 of the Code.

IT IS HEREBY FURTHER ORDERED AND ADJUDGED AND DECREED with respect to the Settlement Agreement dated as of January 29, 1985, between Insurance Company of North America, Midland Insurance Company and All-

state Insurance Company as corporate successor of Northbrook Excess & Surplus Insurance Company (formerly known as "Northbrook Insurance Company"), on the one hand, and Manville Corporation, et al., on the other hand, that:

10.1 *Definitions.* As used in this Paragraph and Paragraph 10.2 below, the following defined terms have the following meanings:

"Affiliate" of another Person means any Person directly or indirectly controlling, controlled by, or under common control with, such other Person. The term "controlling" (including, with correlative meaning, the terms "controlled by" or "under common control with"), as used with respect to any Person, shall mean the possession, directly or indirectly, of the power to cause the direction of the management and policies of such Person, whether through the ownership of securities, by contract or otherwise.

"Aggregate Limit of Liability" means (subject to increase or reinstatement in accordance with the provisions of Paragraph 5 of the Settlement Agreement) Thirty-Seven Million Dollars ($37,000,000) as to INA, Forty-Six Million Seven Hundred Fifty Thousand Dollars ($46,750,000) as to Midland and Twenty-Eight Million Fifty Thousand Dollars ($28,050,000) as to Allstate.

"Allstate" means Allstate Insurance Company as corporate successor of Northbrook Excess & Surplus Insurance Company (formerly known as "Northbrook Insurance Company").

"Dismissal Agreement" means the "Agreement for Dismissal of Litigation in Contemplation of Settlement" entered into by the parties to the

Settlement Agreement substantially in the form of Exhibit A thereto.

"Dismissals" means the Dismissals with Prejudice and the Dismissals Without Prejudice provided for in the Dismissal Agreement.

"Final Order" means a judgment, order or other decree approved or entered by any State or Federal court (including, without limitation, this Court) located in one of the States, or the District of Columbia, which judgment, order or other decree has not been reversed or stayed and (i) as to which no appeal, petition for hearing or rehearing or petition for certiorari is pending, or (ii) as to which no further appeal, petition for hearing or rehearing or petition for certiorari is permitted.

"INA" means Insurance Company of North America.

"JCP No. 1072" means Judicial Council Coordination Proceeding No. 1072, presently pending in the Superior Court of the State of California, City and County of San Francisco, which includes the JM/Marsh Action.

"JM/Marsh Action" means all of the allegations and claims of the parties to *Johns-Manville Corporation, et al. v. The Home Insurance Company, et al.*, Docket No. 765226, and *Johns-Manville Corporation, et al. v. Marsh & McLennan, Incorporated, et al.*, Docket No. 787776, each of which is included in JCP No. 1072, and includes the JM Included Action.

"JM Debtors" means Johns-Manville Corporation and each of its Affiliates which filed a petition for reorganization under Chapter 11 of the Code with this Court on August 26, 1982, unless

such corporation has had or will have a plan of reorganization confirmed by an order of this Court which is a Final Order prior to the Plan Confirmation Date.

"JM Employees" means present, former or future directors, officers and employees of one or more of the JM Insureds.

"JM Group" means the JM Insureds and the JM Employees.

"JM Included Action" means that portion of JCP No. 1072 represented by the allegations and claims of the JM Plaintiffs against the Settling Insurers and the allegations and claims of the Settling Insurers against the JM Plaintiffs, or any other Settling Insurer; provided, however, that "JM Included Action" shall not include that portion of JCP No. 1072 represented by the allegations and claims of the JM Plaintiffs against Midland and the allegations and claims of Midland against the JM Plaintiffs relating to Midland Policy No. XL 147541 for the policy period July 1, 1979 - July 1, 1980.

"JM Insureds" means Manville Corporation, the JM Plaintiffs and each other Person (except natural persons) who was or is an Affiliate of Manville Corporation or Johns-Manville Corporation.

"JM Plaintiffs" means "Johns-Manville Corporation, Johns-Manville Sales Corporation, Johns-Manville International Corporation, Johns-Manville Canada Inc. (now known as JM Asbestos Inc.) and Johns-Manville Amiante Canada Inc. (now known as JM Asbestos Inc.), each of which is a named plaintiff in JCP No. 1072.

"JM Releases" means the releases to be executed by Manville Corporation and each of the JM Plaintiffs on behalf of themselves and each other JM Insured and their respective successors and assigns, in substantially the form attached to the Settlement Agreement as Exhibit B.

"Midland" means Midland Insurance Company.

"Person" means an individual, a corporation, a partnership, an association, a trust or any other entity or organization, including, without limitation, any government or political subdivision or an agency or instrumentality thereof.

"Plan" means the Joint Plan of Reorganization, dated October 17, 1983, of the JM Debtors, as filed with this Court on November 23, 1983, and as amended, modified or superseded from time to time, in the form in which it is confirmed by an order of this Court which is a Final Order.

"Plan Confirmation Date" means the date on which the Plan Confirmation order becomes a Final Order.

"Plan Confirmation Order" means the order entered by this Court confirming the Plan.

"Policies" means the following insurance policies (and only the following insurance policies) issued by the Settling Insurers to the JM Insureds:

Settling Insurer	Policy Number	Policy Periods (for information only)
INA	XCP 3530	3/18/66 - 7/01/69
	XCP 3628	7/01/69 - 7/01/72
Midland	XL 2184	3/03/72 - 7/01/72
	XL 2504 & XL 2505	7/01/72 - 7/01/75

Settling Insurer	Policy Number	Policy Periods (for information only)
Allstate	63 000 928	7/01/75 - 7/01/76
	63 001 943	7/01/76 - 7/01/77
	63 003 297	7/01/77 - 7/01/78
	63 003 298	7/01/77 - 7/01/78

provided, however, that the term "Policies" does not and shall not include any coverage which may exist in the above listed insurance policies for statutory workers' compensation, as referred to in Paragraph 8 of the Settlement Agreement.

"Policy Claims" means any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be, asserted by any Person against any or all members of the JM Group or against any or all members of the Settling Insurer Group based upon, arising out of, or relating to, any or all of the Policies.

"Settlement Agreement" means the Settlement Agreement dated as of January 29, 1985, between the Settling Insurers, on the one hand, and Manville Corporation, et al., on the other hand.

"Settling Insurer" means any one of (i) INA, (ii) Midland, and (iii) Allstate.

"Settling Insurer Group" means the Settling Insurers and their respective present, former or future directors, officers and employees. The "Settling Insurer Group" of a Settling Insurer means such Settling Insurer and its respective present, former or future directors, officers and employees.

"Settling Insurers" means INA, Midland, and Allstate.

Where the context so requires, each defined term stated in a singular form shall include the plural form, and each defined term stated in a plural form shall include the singular form.

10.2 *Orders.*

(A) The Settlement Agreement is, in all respects, approved, and the execution, delivery and performance of the Settlement Agreement and certain other documents referred to therein (including, without limitation, the Dismissal Agreement, the Dismissals and the JM Releases) by Manville Corporation on behalf of itself and its Affiliates and by each of the JM Plaintiffs are hereby ratified and confirmed, and such parties are hereby authorized to execute and/or deliver such additional documents (as may be provided for in the Settlement Agreement) and do such things as may be necessary to perform, implement and effectuate the Settlement Agreement and this Order;

(B) at and after the date of this Order, each Settling Insurer as to which the Settlement Agreement has not been terminated shall have no duties or obligations to any Person based upon, arising out of or related to any or all the Policies, except as may be imposed by the Settlement Agreement;

(C) upon payment by any Settling Insurer as to which the Settlement Agreement has not been terminated of an aggregate amount equal to its Aggregate Limit of Liability in accordance with

the terms and provisions of the Settlement Agreement, such Settling Insurer and its Settling Insurer Group shall have no further duties or obligations based upon, arising out of or related to the Policies and shall thereafter be released from any and all Policy Claims by any Person, and all of the Policies of any or all members of such Settling Insurer Group shall upon such performance be deemed exhausted and shall thereupon be null and void and of no further force or effect;

(D) all Persons are permanently restrained and enjoined from commencing and/or continuing any suit, arbitration or other proceeding of any type or nature for Policy Claims against any or all members of the Settling Insurer Group of any Settling Insurer as to which the Settlement Agreement has not been terminated (it being understood that cross-claims which are unrelated to Policy Claims and which are asserted by any party to JCP No. 1072 against the Settling Insurers are not so enjoined); and

(E) upon payment by any Settling Insurer as to which the Settlement Agreement has not been terminated of an amount equal to its Aggregate Limit of Liability in accordance with the terms and provisions of the Settlement Agreement, the dismissal, unconditionally and with prejudice, of both: (i) the claims between the JM Plaintiffs, on the one hand, and such Settling Insurer, on the other hand, asserted or assertable in the JM Included Action, and (ii) the JM Included Action (with respect to such claims) itself, is hereby approved and authorized.

11. IT IS HEREBY FURTHER ORDERED AND ADJUDGED AND DECREED with respect to the Settlement Agreement dated as of February 20, 1986, between INSCO Ltd., on the one hand, and Manville Corporation, et al., on the other hand, that:

11.1 *Definitions.* As used in this Paragraph and Paragraph 11.2 below, the following defined terms have the following meanings:

"Affiliate" of another Person means any Person directly or indirectly controlling, controlled by, or under common control with, such other Person. The term "controlling" (including, with correlative meaning, the terms "controlled by" or "under common control with"), as used with respect to any Person, shall mean the possession, directly or indirectly, of the power to cause the direction of the management and policies of such Person, whether through the ownership of securities, by contract or otherwise.

"Code" means the laws of the United States relating to bankruptcy or reorganization, including, without limitation, Title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.*, as amended.

"Effective Date" means February 20, 1986.

"Final Order" means a judgment, order or other decree approved or entered by any State or Federal Court (including, without limitation, this Court) located in one of the States, or the District of Columbia, which judgment, order or other decree has not been reversed or stayed and as to which the time to appeal has expired and as to which no appeal, petition for rehearing or petition for certiorari is pending (or if such appeal

has been filed or any such petition has been granted, it has been finally decided and such judgment, order or other decree has not been reversed or stayed).

"JCP No. 1072" means Judicial Council Proceeding No. 1072, presently pending in the Superior Court of the State of California, County of San Francisco, which includes the JM Included Action.

"JM Debtors" means Johns-Manville Corporation and each of its Affiliates which filed a petition for reorganization under Chapter 11 of the Code with this Court on August 26, 1982, unless such corporation has had or will have a plan of reorganization confirmed by an order of this Court which is a Final Order prior to the Plan Confirmation Date.

"JM Group" means the JM Insureds and the present, former and future directors, officers and employees of each of one or more JM Insureds.

"JM Included Action" means that portion of JCP No. 1072 represented by the allegations and claims of the JM Plaintiffs against the Settling Insurer with respect to the Policy and the allegations and claims of the Settling Insurer against the JM Plaintiffs with respect to the Policy.

"JM Insureds" means Manville Corporation, the JM Plaintiffs and each other Person (except natural persons) who was or is an Affiliate of Manville Corporation or Johns-Manville Corporation.

"JM Plaintiffs" means Johns-Manville Corporation, Johns-Manville Sales Corporation (now known as Manville Sales Corporation), Johns-Manville International Corporation, Johns-

Manville Canada Inc. (now known as JM Asbestos Inc.) and Johns-Manville Amiante Canada Inc. (now known as JM Asbestos Inc.), each of which is a named plaintiff in JCP No. 1072.

"Person" means an individual, a corporation, a partnership, an association, a trust or any other entity or organization, including, without limitation, any government or political subdivision or an agency or instrumentality thereof.

"Plan" means the Joint Plan of Reorganization dated October 17, 1983, of the JM Debtors, as filed with this Court on November 21, 1983, and as amended, modified or superseded from time to time, in the form in which it is confirmed by a Final Order of this Court.

"Plan Confirmation Date" means the date on which the Plan Confirmation order becomes a Final Order.

"Plan Confirmation Order" means the order entered by this Court confirming the Plan.

"Policy" means policy number MLI 1309 (policy period July 1, 1979 - July 1, 1980) issued by the Settling Insurer to the JM Insureds.

"Policy Claims" means any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be, asserted by any Person against any or all members of the JM Group or against any or all members of the Settling Insurer Group based upon, arising out of or relating to the Policy.

"Settlement Agreement" means the Settlement Agreement dated as of February 20, 1986, between the Settling Insurer, on the one hand, and Manville Corporation, et al., on the other hand.

"Settlement Amount" means Three Hundred Eighty-Seven Thousand Five Hundred Dollars ($387,500).

"Settlement Fund" means the Settlement Amount upon its deposit with (or in accordance with the written instructions of) the Clerk of this Court in accordance with the provisions of Paragraph 2 of the Settlement Agreement, and all investment income thereon and gains or losses attributable thereto after any such deposit.

"Settling Insurer" means INSCO Ltd.

"Settling Insurer Group" means the Settling Insurer and each of its present, former and future directors, officers, and employees.

Where the context so requires, each defined term stated in a singular form shall include the plural form, and each defined term stated in a plural form shall include the singular form.

11.2 *Orders.*

(A) The disposition of the Settlement Fund is subject to the jurisdiction and further order of this Court;

(B) unless and until the Settlement Agreement terminates, any and all claims, charges or encumbrances which might otherwise have been assessable or assertable by any Person against or with respect to the JM Group's rights and interests based upon, arising out of or related to the Policy, and any and all claims or causes of action in law, equity, admiralty or otherwise based upon, arising out of, or related to the Policy or which were or are assessable or assertable by any Person against the Policy or any or all members

of the Settling Insurer Group, are transferred, and shall attach, solely to the Settlement Fund;

(C) unless and until the Settlement Agreement terminates, upon the Effective Date, the Settling Insurer and its Settling Insurer Group shall have no duties or obligations after the Effective Date based upon, arising out of or related to the Policy (including but not limited to liability for excess workers compensation liability, property damage liability, general liability and any and all other liability) and shall thereafter be released from any and all Policy Claims by any Person, and the Policy shall thereafter be deemed exhausted and shall thereupon be null and void and of no further force or effect;

(D) unless and until the Settlement Agreement terminates, all Persons are restrained and enjoined from commencing and/or continuing any suit, arbitration or other proceeding of any type or nature with respect to Policy Claims against any or all members of the Settling Insurer Group (it being understood that cross-claims which are unrelated to Policy Claims and which are asserted by any party to JCP No. 1072 against the Settling Insurer are excluded from this clause (D)), except that no Person who asserted prior to the date this Order becomes a Final Order, a claim or cause of action against one or more of the Settling Insurer Group seeking any and all damages (other than or in addition to policy proceeds) for bad faith or other insurer misconduct alleged in connection with the handling or disposition of claims is enjoined from proceeding only with respect to such claim or cause

of action; *provided, however*, that any person or entity who (i) asserts such a claim or cause of action where the alleged act or acts or failure or failures to act upon which such claim or cause of action is based arose after the date of this Order and/or who (ii) asserts a claim or cause of action against the Settlement Fund or files a proof of claim for, or receives, a payment under the Plan is so restrained and enjoined from commencing or continuing any such action against any or all members of the Settling Insurer Group; and

(E) upon payment of the Settlement Amount in accordance with the terms and provisions of the Settlement Agreement, the JM Plaintiffs are authorized to dismiss, unconditionally and with prejudice (unless the Settlement Agreement shall otherwise be terminated in accordance with its terms), both of the following: (i) the claims of the JM Plaintiffs against the Settling Insurer asserted or assertable in the JM Included Action, and (ii) the JM Included Action itself.

12. IT IS HEREBY FURTHER ORDERED AND ADJUDGED AND DECREED with respect to the Settlement Agreement dated as of October 20, 1986, between International Surplus Lines Insurance Company, on the one hand, and Manville Corporation, et al., on the other hand, that:

12.1 *Definitions.* As used in this Paragraph and Paragraph 12.2 below, the following defined terms have the following meanings:

"Affiliate" of another Person means any Person directly or indirectly controlling, controlled by, or under common control with, such other Person.

The term "controlling" (including, with correlative meaning, the terms "controlled by" or "under common control with"), as used with respect to any Person, shall mean the possession, directly or indirectly, of the power to cause the direction of the management and policies of such Person, whether through the ownership of securities, by contract or otherwise.

"Final Order" means a judgment, order or other decree approved or entered by any State or Federal Court (including, without limitation, this Court) located in one of the States, or the District of Columbia, which judgment, order or other decree has not been reversed or stayed and as to which the time to appeal has expired and as to which no appeal, petition for rehearing or petition for certiorari is pending (or if such appeal has been filed or any such petition has been granted, it has been finally decided, and such judgment, order or other decree has not been reversed or stayed).

"JCP No. 1072" means Judicial Council Proceeding No. 1072, presently pending in the Superior Court of the State of California, City and County of San Francisco, which includes the JM Included Action.

"JM Group" means the JM Insureds and the present, former and future directors, officers and employees of each of one or more JM Insureds.

"JM Included Action" means that portion of JCP No. 1072 represented by the allegations and claims of the JM Plaintiffs against the Settling Insurer with respect to the Policies and the allegations and claims of the Settling Insurer

against the JM Plaintiffs with respect to the Policies.

"JM Insureds" means Manville Corporation, the JM Plaintiffs and each other Person (except natural persons) who is an Affiliate of Manville Corporation, or Johns-Manville Corporation.

"JM Plaintiffs" means Johns-Manville Corporation, Johns-Manville Sales Corporation (now known as Manville Sales Corporation), Johns-Manville International Corporation, Johns-Manville Canada Inc. (now known as JM Asbestos Inc.) and Johns Manville Amiante Canada Inc. (now known as JM Asbestos Inc.), each of which is a named plaintiff in JCP No. 1072.

"L/C Bank" means the issuer of the Letter of Credit or any renewal Letter of Credit obtained by the Settling Insurer pursuant to Paragraph 9(b) of the Settlement Agreement.

"Letter of Credit" means an irrevocable letter of credit, in substantially the form attached as Exhibit F to the Settlement Agreement, issued pursuant to Paragraph 9 of the Settlement Agreement, and any renewal thereof.

"Person" means an individual, a corporation, a partnership, an association, a trust or any other entity or organization, including, without limitation, any government or political subdivision or an agency or instrumentality thereof.

"Plan" means the Second Amended and Restated Plan of Reorganization of Manville Corporation dated August 22, 1986, as amended, modified or superseded from time to time, in the form in which it is confirmed by a Final Order of this Court.

"Plan Confirmation Order" means the order entered by this Court confirming the Plan.

"Policies" means the following insurance policies (and only the following insurance policies) issued by the Settling Insurer to the JM Insureds:

Policy Number	Policy Periods (for information only)
XSI 5205	7/01/79 - 5/07/80
XSI 5206	7/01/79 - 5/07/80

"Policy Claims" means any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be, asserted by any Person against any or all members of the JM Group or against any or all members of the Settling Insurer Group based upon, arising out of or relating to the Policies.

"Settlement Agreement" means the Settlement Agreement dated as of October 20, 1986, between the Settling Insurer, on the one hand, and Manville Corporation, et al., on the other hand.

"Settlement Amount" means Two Million Dollars ($2,000,000)

"Settlement Fund" means the Settlement Amount, together with any amounts paid by the Settling Insurer pursuant to Paragraph 5(b) or 5(c) of the Settlement Agreement, upon deposit of such amounts with (or in accordance with the written instructions of) the Clerk of this Court in accordance with the provisions of Paragraph 2 of the Settlement Agreement, and all investment income thereon and gains or loses attributable thereto after any such deposit.

"Settling Insurer" means International Surplus Lines Insurance Company.

"Settling Insurer Group" means the Settling Insurer and each of its present and former Affiliates and present, former and future directors, officers, and employees.

Where the context so requires, each defined term stated in a singular form shall include the plural form, and each defined term stated in a plural form shall include the singular form.

12.2 *Orders.*

(A) The disposition of the Settlement Fund is subject to the jurisdiction and further order of this Court;

(B) unless and until the Settlement Agreement terminates, any and all claims, charges or encumbrances which might otherwise have been assessable or assertable by any Person against or with respect to the JM Group's rights and interests based upon, arising out of or related to the Policies, and any and all claims or causes of action in law, equity, admiralty or otherwise based upon, arising out of, or related to the Policies or which were or are assessable or assertable by any Person against the Policies or any or all members of the Settling Insurer Group, are transferred, and shall attach, solely to the Settlement Fund;

(C) unless and until the Settlement Agreement terminates, upon payment by the L/C Bank of the Settlement Amount to (or in accordance with the written instructions of) the Clerk of this Court in accordance with Paragraph 2(c) of the Settlement

Agreement, the Settling Insurer and its Settling Insurer Group shall have no duties or obligations based upon, arising out of or related to the Policies and shall thereafter be released from any and all Policy Claims by any Person, and the Policies shall thereafter be deemed exhausted and shall thereupon be null and void and of no further force or effect;

(D) unless and until the Settlement Agreement terminates, all Persons are restrained and enjoined from commencing and/or continuing any suit, arbitration or other proceeding of any type or nature with respect to Policy Claims against any or all members of the Settling Insurer Group (it being understood that cross-claims which are unrelated to Policy Claims and which are asserted by any party to JCP No. 1072 against the Settling Insurer are excluded from this clause (D)), except that no Person who asserted prior to the date this Order becomes a Final order, a claim or cause of action against one or more of the Settling Insurer Group seeking any and all damages (other than or in addition to policy proceeds) for bad faith or other insurer misconduct alleged in connection with the handling or disposition of claims is enjoined from proceeding only with respect to such claim or cause of action; *provided, however,* that any Person who (i) asserts such a claim or cause of action where the alleged act or acts or failure or failures to act upon which such claim or cause of action is based arose after the date of this Order and/or (ii) asserts a claim or cause of action against the Settlement Fund or files a proof of claim for, or receives, a payment under the Plan is so

restrained and enjoined from commencing or continuing any such action against any or all members of the Settling Insurer Group; and

(E) upon delivery by the L/C Bank of the Settlement Amount to (or in accordance with the written instructions of) the Clerk of this Court in accordance with the terms and provisions of the Settlement Agreement, the JM Plaintiffs are authorized to dismiss, unconditionally and with prejudice (unless the Settlement Agreement shall otherwise be terminated in accordance with its terms), both of the following: (i) the claims of the JM Plaintiffs against the Settling Insurer asserted or assertable in the JM Included Action, and (ii) the JM Included Action itself.

13. IT IS HEREBY FURTHER ORDERED AND ADJUDGED AND DECREED with respect to the Settlement Agreement dated as of September 8, 1986, between the Settling Insurers (as defined in Paragraph 13.1 below), on the one hand, and Manville Corporation, et al., on the other hand, that:

13.1 *Definitions.* As used in this Paragraph and Paragraph 13.2 below, the following defined terms have the following meanings:

"Affiliate" of another Person means any Person directly or indirectly controlling, controlled by, or under common control with, such other Person. The term "controlling" (including, with correlative meaning, the terms "controlled by" or "under common control with"), as used with respect to any Person, shall mean the possession, directly or indirectly, of the power to cause the direction of the management and policies of such Person,

whether through the ownership of securities, by contract or otherwise.

"Business Day" means, (i) with respect to deposits with this Court, any day on which this Court is open, and (ii) with respect to any other usage, any day except a Saturday, Sunday or other day on which commercial banks in New York City are authorized by law to close.

"Final Installment Payment" means Twenty-Six Million Eight Hundred Sixty Thousand Nine Hundred Nineteen Dollars (U.S. $26,860,919), due and payable on the Final Payment Date.

"Final Order" means a judgment, order or other decree approved or entered by any State or Federal Court (including, without limitation, this Court) located in one of the States, or the District of Columbia, which judgment, order or other decree has not been reversed or stayed and as to which the time to appeal has expired and as to which no appeal, petition for rehearing or petition for certiorari is pending (or if such appeal has been filed or any such petition has been granted, it has been finally decided and such judgment, order or other decree has not been reversed or stayed).

"Final Payment Date" means the second anniversary of the First Payment Date, or, if such second anniversary is not a Business Day, then the first Business Day thereafter.

"First Payment Date" means the later of (i) July 1, 1987, and (ii) the ninetieth day following the Plan Confirmation Date or, if such ninetieth day is not a Business Day, then the first Business Day thereafter.

"JCP No. 1072" means Judicial Council Proceeding No. 1072, presently pending in the Superior Court of the State of California, City and County of San Francisco, which includes the JM Included Action.

"JM Group" means the JM Insureds and the present, former and future directors, officers and employees of each of one or more of the JM Insureds.

"JM Included Action" means that portion of JCP No. 1072 represented by the allegations and claims of the JM Plaintiffs against the Litigant Settling Insurer Parties with respect to certain of the Policies and the allegations and claims of the Litigant Settling Insurer Parties against the JM Plaintiffs with respect to those Policies.

"JM Insureds" means Manville Corporation, the JM Plaintiffs and each other Person (except natural persons) who is an Affiliate of Manville Corporation or Johns-Manville Corporation.

"JM Plaintiffs" means Johns-Manville Corporation, Johns-Manville Sales Corporation (now known as Manville Sales Corporation), Johns-Manville International Corporation, Johns-Manville Canada Inc. (now known as JM Asbestos Inc.) and Johns-Manville Amiante Canada Inc. (now known as JM Asbestos Inc.), each of which is a named plaintiff in JCP No. 1072.

"Litigant Settling Insurer Parties" means those Settling Insurer Parties that are defendants in the JM Included Action, as indicated on Exhibit I to the Settlement Agreement.

"Person" means an individual, a corporation, a partnership, an association, a trust or any other

entity or organization, including, without limitation, any government or political subdivision or an agency or instrumentality thereof.

"Plan" means the revised form of the Second Amended and Restated Plan of Reorganization of Manville Corporation dated May 23, 1986, as filed with this Court on June 4, 1986, and as amended, modified or superseded from time to time, in the form in which it is confirmed by a Final Order of this Court.

"Plan Confirmation Date" means the date on which the Plan Confirmation Order becomes a Final Order.

"Plan Confirmation Order" means the order entered by this Court confirming the Plan.

"Policies" means the following listed insurance policies (and only the following insurance policies) issued by the Settling Insurer Parties to the JM Insureds, as such policies may be modified, amended or supplemented to the date of the Settlement Agreement:

Policy Number	Policy Periods (for information only)
UKL 1177	July 1, 1978 - July 1, 1980
UKL 1178	July 1, 1978 - July 1, 1980
UKL 1179	July 1, 1978 - July 1, 1979
UKL 1180	July 1, 1978 - July 1, 1980
UKL 1181	July 1, 1978 - July 1, 1979
ULL 0931	July 1, 1979 - July 1, 1980
ULL 0932	July 1, 1979 - July 1, 1980
ULL 1218	July 1, 1979 - July 1, 1980
UMA 0476	July 1, 1980 - July 1, 1983
UMA 0477	July 1, 1980 - July 1, 1981
UMA 0478	July 1, 1980 - July 1, 1981
UMA 0479	July 1, 1980 - July 1, 1981

Policy Number	Policy Periods (for information only)
UNA 0412	July 1, 1980 - July 1, 1983
UNA 0413	July 1, 1980 - July 1, 1983
UNA 0414	July 1, 1981 - July 1, 1983

"Policy Claims" means any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be, asserted by any Person against any or all members of the JM Group or against any or all members of the Settling Insurer Group based upon, arising out of or relating to the Policies.

"Settlement: Agreement" means the Settlement Agreement dated as of September 8, 1986, between the Settling Insurers, on the one hand, and Manville Corporation, et al., on the other hand.

"Settlement Amount" means Sixty-Two Million One Hundred Seventy-Six Thousand Five Hundred Fifty-Six Dollars (U.S. $62,176,556), consisting of three installment payments as described in the Settlement Agreement.

"Settlement Fund" means the Settlement Amount, together with all amounts paid by the Settling Insurer Parties pursuant to Paragraph 5 of the Settlement Agreement, upon deposit of such amounts with (or in accordance with the written instructions of) the Clerk of this Court in accordance with the provisions of the Settlement Agreement and the Trust Agreement, and all investment income thereon and gains or losses attributable thereto after any such deposit.

"Settling Insurer Group" means the Settling Insurer Parties and their respective present or

former Affiliates and each of their present, former and future directors, officers, stockholders (in their capacity as such), members, members' agents, insurance underwriters, and employees.

"Settling Insurer Party" means (i) any company or corporation (as presently or previously constituted) or any syndicate of Lloyd's of London (including each member of such syndicate as such syndicate is presently or was previously constituted) which is or is alleged to be a subscribing insurer to one or more of the Policies (including each Litigant Settling Insurer Party), and (ii) any company, corporation, syndicate or other entity which is listed on the signature pages to the Settlement Agreement by reason of being a successor, assignee or otherwise of a Settling Insurer Party; *provided, however,* that none of Pacific & General Insurance Company, Limited, Mentor Insurance Company (United Kingdom) Limited and Compania Agricola de Seguros is a "Settling Insurer Party" for purposes of the Settlement Agreement.

"Settling Insurers" means Allianz Versicherungs Aktiengesellschaft, Assicurazioni Generali Di Trieste E Venezia S.P.A, Bellefonte Insurance Company, Bermuda Fire & Marine Insurance Company Ltd., Chemical Insurance Company Ltd., CNA Reinsurance of London Ltd., Dart Insurance Company Ltd., Dominion Insurance Company Ltd., Eisen Und Stahl Ruckversicherungs Aktiengesellschaft, El Paso Insurance Company Ltd., INSCO Ltd., La Preservatrice Compagnie Anonyme d'Assurances Contres Les Accidents L'Incendie et Les Risques Divers, Le Assicurazioni D'Italia Societa Per Azioni, Mutual Reinsurance Com-

pany Ltd., Nisshin Fire & Marine Insurance Company Ltd., North Atlantic Insurance Company Limited, Reaseguradora Nacional De Venezuela Compania Anonima, Royale Belge I.R. S.A. D'Assurances, St. Katherine Insurance Company Ltd., Stronghold Insurance Company Ltd., Union Atlantique D'Assurances S.A., Walbrook Insurance Company, Ltd., "Winterthur" Swiss Insurance Company, Yasuda Fire & Marine Insurance Company (UK) Ltd., British National Life Insurance Society Ltd., Brittany Insurance Company Ltd., Bryanston Insurance Company Ltd., Compagnie Europeene D'Assurances Industrielles S.A., Groupe Josi Re, International Insurance Company, Latino Americana De Reaseguros, Louisville Insurance Company Ltd., and the following Underwriting Syndicates, Lloyd's of London (including the underwriting members thereof): 99, 126, 175, 219, 231, 235, 278, 279, 365, 408, 518, 553, 618, 653, 661, 701, 799, 918, 948 and 989.

"Trust" means the trust established pursuant to Paragraphs 2 and 9 of the Settlement Agreement and administered pursuant to the Trust Agreement.

"Trust Agreement" means the Trust Agreement dated as of September 8, 1986, between the parties to the Settlement Agreement and the Trustee with respect to the terms and provisions governing the administration of the Trust.

"Trustee" means The Colorado National Bank of Denver, a national banking association, the trustee under the Trust Agreement, and any successor thereto.

Where the context so requires, each defined term stated in a singular form shall include the plural form, and each defined term stated in a plural form shall include the singular form.

13.2 *Orders.*

(A) The disposition of the Settlement Fund is subject to the jurisdiction and further order of this Court;

(B) unless and until the Settlement Agreement terminates in accordance with the express provisions thereof, any and all claims, charges or encumbrances which might otherwise have been assessable or assertable by any Person against or with respect to the JM Group's rights and interests based upon, arising out of or related to any or all of the Policies, and any and all claims or causes of action in law, equity, admiralty or otherwise based upon, arising out of, or related to any or all of the Policies or which were or are assessable or assertable by any Person against any or all of the Policies or any or all members of the Settling Insurer Group, are transferred and shall attach solely to the Settlement Fund;

(C) unless and until the Settlement Agreement terminates in accordance with the express provisions thereof, the Settling Insurer Group shall have no duties or obligations based upon, arising out of or related to the Policies, and shall be released from any and all Policy Claims by any Person, and the Policies shall hereafter be deemed exhausted and shall hereupon be null and void and of no further force or effect as to any member of the Settling Insurer Group;

(D) unless and until the Settlement Agreement terminates in accordance with the express provisions thereof, all Persons are restrained and enjoined from commencing and/or continuing any suit, arbitration or other proceeding of any type or nature with respect to Policy Claims against any or all members of the Settling Insurer Group (it being understood that cross-claims asserted by any party to JCP No. 1072 against the Litigant Settling Insurer Parties that are unrelated to Policy Claims are excluded from this clause (D); and

(E) promptly after the Final Payment Date, and provided that no member of the Settling Insurer Group shall have attempted to prevent the Trustee from paying the Final Installment Payment to the Clerk of this Court in accordance with the Trust Agreement, the JM Plaintiffs are authorized to dismiss, unconditionally and with prejudice, both of the following: (i) the claims of the JM Plaintiffs against the Settling Insurer Group asserted or assertable in the JM Included Action, and (ii) the JM Included Action itself.

14. IT IS HEREBY FURTHER ORDERED AND ADJUDGED AND DECREED with respect to the Settlement Agreement dated as of October 10, 1986, between Marsh & McLennan, Incorporated and Marsh & McLennan, Limited, on the one hand, and Manville Corporation, et al., on the other hand, that:

14.1 *Definitions.* As used in this Paragraph and Paragraph 14.2 below, the following defined terms have the following meanings:

"Affiliate" of another Person means any Person directly or indirectly controlling, controlled by, or under common control with, such other Person. The term "controlling" (including, with correlative meaning, the terms "controlled by" or "under common control with"), as used with respect to any Person, shall mean the possession, directly or indirectly, of the power to cause the direction of the management and policies of such Person, whether through the ownership of securities, by contract or otherwise.

"Applicable Rate" means, for each one-year period or portion thereof, the rate determined on the first Business Day of such period equal to the per annum discount rate for the most recently auctioned one-year U.S. Treasury Bills, as published by the Board of Governors of the Federal Reserve System, plus one percent (1%).

"Business Day" means (i) with respect to deposits with, or wire transfers to, this Court, any day on which this Court is open, and (ii) with respect to any other usage, any day except a Saturday, Sunday or other day on which commercial banks in New York City or Pittsburgh, Pennsylvania are authorized by law to close.

"Dismissal Agreement" means the "Agreement for Dismissal of Litigation in Contemplation of Settlement" dated October 10, 1986, between the JM Plaintiffs and Marsh.

"Effective Date" means October 10, 1986.

"E&O Release" means a release executed by Manville Corporation and by the JM Plaintiffs, substantially in the form attached as Exhibit B to the Settlement Agreement, and delivered to the Trustee.

"Final Order" means a judgment, order or other decree approved or entered by any State or Federal Court (including, without limitation, this Court) located in one of the States, the territories of the United States, or the District of Columbia, which judgment, order or other decree has not been reversed or stayed and as to which the time to appeal has expired and as to which no appeal, petition for rehearing or petition for certiorari is pending (or if such appeal has been filed or any such petition has been granted, it has been finally decided and such judgment, order or other decree has not been reversed or stayed).

"Funding Date" means the later of (i) January 1, 1987 and (ii) the fifth Business Day following the first date on which both this Order becomes a Final Order and the Plan Confirmation Date has occurred.

"Home Action" means that portion of JCP No. 1072 represented by the allegations and claims of the JM Plaintiffs against their insurers, and the allegations and claims by their insurers against the JM Plaintiffs, instituted on March 31, 1980 in the Superior Court of the State of California, City and County of San Francisco, entitled *Johns-Manville Corporation, et al., v. the Home Insurance Company, et al.*, Docket No. 765226.

"JCP No. 1072" means Judicial Council Proceeding No. 1072, presently pending in the Superior Court of the State of California, City and County of San Francisco, which includes the JM Included Actions.

"JM Group" means any or all of the JM Insureds and the present, former and future

directors, officers and employees of each of one or more JM Insured.

"JM Included Actions" means the Home Action and the Marsh Action.

"JM Insureds" means any or all of Manville Corporation, the JM Plaintiffs and each other Person (except natural persons) who is an Affiliate of Manville Corporation or Johns-Manville Corporation.

"JM Plaintiffs" means any or all of Johns-Manville Corporation, Johns-Manville Sales Corporation (now known as Manville Sales Corporation), Johns-Manville International Corporation, Johns-Manville Canada Inc. (now known as JM Asbestos Inc.) and Johns-Manville Amiante Canada Inc. (now known as JM Asbestos Inc.), each of which is a named plaintiff in JCP No. 1072.

"JM Release" means a release executed by Manville Corporation and by the JM Plaintiffs, substantially in the form attached as Exhibit D to the Settlement Agreement, and delivered to the Trustee.

"JM Responsible Entity" means the Persons which are (or, on or after the Plan Confirmation Date, the Person or Persons which will. be, under the Plan (or pursuant to an order of this Court)) liable for asbestos-related claims (including, without limitation, health, personal injury or property damage claims) involving any or all JM Insureds. As of the date hereof, the JM Responsible Entity is designated under the Plan as the "Trust" and the "PD Trust".

"Marsh" means both Marsh & McLennan, Incorporated, a Delaware corporation, and Marsh & McLennan, Limited, a Canadian corporation.

"Marsh Action" means that portion of JCP No. 1072 represented by the allegations and claims of the JM Plaintiffs against Marsh, and the defenses of Marsh against the JM Plaintiffs, instituted on November 28, 1981 in the Superior Court of the State of California, City and County of San Francisco, entitled *Johns-Manville Corporation, et al., v. Marsh & McLennan, Incorporated, et al.*, Docket No. 787776.

"Marsh Claims" means any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be, asserted by any Person against the Marsh Group based upon, arising out of or relating to services (whether acts or omissions) performed by the Marsh Group for the JM Group, at any time, in connection with insurance policies issued to or for the benefit of any of the JM Group (other than insurance policies issued to any individual member of the JM Group which were not issued in connection with such member's employment by the JM Insureds), including, without limitation, the negotiation, placement and securing of such policies, and attempts to receive the proceeds of, as well as the application for, advice concerning and any claims asserted under, such policies.

"Marsh Group" means any or all of Marsh and its present or former Affiliates, and each of their present, former and future directors, officers, and employees.

"Person" means an individual, a corporation, a partnership, an association, a trust or any other entity or organization, including, without limitation, any government or political subdivision or an agency or instrumentality thereof.

"Plan" means the revised form of the Second Amended and Restated Plan of Reorganization of Manville Corporation dated May 23, 1986, as filed with this Court on June 4, 1986, and as amended, modified or superseded from time to time, in the form in which it is confirmed by a Final Order of this Court.

"Plan Confirmation Date" means the date on which the Plan Confirmation order becomes a Final Order.

"Plan Confirmation Order" means the order entered by this Court confirming the Plan.

"Settlement Agreement" means the Settlement Agreement dated as of October 10, 1986, between Marsh, on the one hand, and Manville Corporation, et al., on the other hand.

"Settlement Amount" means Twenty-Nine Million Seven Hundred Fifty Thousand U.S. Dollars (U.S. $29,750,000) plus interest, if any, accrued thereon at the Applicable Rate for (i) initially, the one-year period (or portion thereof) commencing on January 1, 1987 and ending on December 31, 1987 or the Funding Date, whichever is earlier, and (ii) thereafter, if the Funding Date has not occurred, for each one-year period (or portion thereof) commencing on the last day of the preceding one-year period and ending one year thereafter or on the Funding Date, whichever is earlier, such interest to be computed on the basis of a 365-day year for the actual days elapsed.

"Settlement Fund" means the Settlement Amount upon its transfer to the Trustee in accordance with the provisions of Paragraph 2 of the Settlement Agreement, all investment income thereon and gains or losses attributable thereto

after such deposit, and any interest paid in accordance with Paragraph 2(f) of the Settlement Agreement, minus any amounts paid to Manville Corporation or Marsh pursuant to Paragraph 11 of the Settlement Agreement.

"Transferred Settlement Fund" means that portion of the Settlement Fund which has been deposited with (or in accordance with the written instructions of) the Clerk of this Court.

"Trust Agreement" means the trust agreement dated October 10, 1986 among Marsh, Manville Corporation, the JM Plaintiffs and the Trustee.

"Trustee" means Mellon Bank, N.A., a national banking association, the trustee under the Trust Agreement, or any successor trustee thereunder.

Where the context so requires, each defined term stated in a singular form shall include the plural form, and each defined term stated in a plural form shall include the singular form.

14.2 *Orders.*

(A) The disposition of the Transferred Settlement Fund is subject to the jurisdiction and further order of this Court;

(B) any and all claims, charges or encumbrances which might otherwise have been assessable or assertable by any Person against or with respect to the JM Group's rights and interests based upon, arising out of or related to Marsh Claims, and any and all claims or causes of action in law, equity, admiralty or otherwise based upon, arising out of, or related to Marsh Claims which were or are assessable or assertable by any Person against any or all members of the Marsh Group are transferred, and

shall attach, solely to the Transferred Settlement Fund;

(C) commencing on the Effective Date, the Marsh Group shall have no further duties or obligations based upon, arising out of or related to Marsh Claims other than those set forth in the Settlement Agreement, the Dismissal Agreement and the Trust Agreement;

(D) commencing on the Plan Confirmation Date, all Persons, except Marsh, are restrained and enjoined from commencing and/or continuing any action, suit, arbitration or other proceeding of any type or nature against the Marsh Group based upon, arising out of, or related to Marsh Claims;

(E) the JM Plaintiffs are authorized to dismiss, unconditionally and with prejudice, both (i) the claims of the JM Plaintiffs against Marsh asserted or assertable in the Marsh Action, and (ii) the Marsh Action itself; and

(F) the JM Responsible Entity shall be deemed to be an assignee of Manville Corporation in Manville Corporation's capacity as releasor under the JM Release and the E&O Release.

15. IT IS HEREBY FURTHER ORDERED AND ADJUDGED AND DECREED with respect to the Settlement Agreement dated as of May 22, 1985, between Peerless Casualty Company (now known as Peerless Insurance Company), on the one hand, and Manville Corporation, et al., on the other hand, that:

15.1 *Definitions.* As used in this Paragraph and Paragraph 15.2 below, the following defined terms have the following meanings:

"Affiliate" of another Person means any Person directly or indirectly controlling, controlled by, or under common control with, such other Person. The term "controlling" (including, with correlative meaning, the terms "controlled by" or "under common control with"), as used with respect to any Person, shall mean the possession, directly or indirectly, of the power to cause the direction of the management and policies of such Person, whether through the ownership of securities, by contract or otherwise.

"Code" means the laws of the United States relating to bankruptcy or reorganization, including, without limitation, Title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.*, as amended.

"Effective Date" means May 22, 1985.

"Escrow Account" means an escrow account administered pursuant to the Escrow Agreement, with a banking institution satisfactory to the JM Plaintiffs.

"Escrow Agent" means the banking institution which is the escrow agent under the Escrow Agreement.

"Escrow Agreement" means the agreement dated as of May 22, 1985 entered into by the parties to the Settlement Agreement and, the Escrow Agent with respect to the terms and provisions governing the administration of the Escrow Account.

"Escrow Property" means the Settlement Amount upon its deposit in the Escrow Account, together with any payment deposited in the

Escrow Account in accordance with Paragraph 5(b) of the Settlement Agreement, and all investment income thereon and gains or losses attributable thereto after such deposits, until release of such payments and interest income from the Escrow Account.

"Final Order" means a judgment, order or other decree approved or entered by any State or Federal Court (including, without limitation, this Court) located in one of the States, or the District of Columbia, which judgment, order or other decree has not been reversed or stayed and as to which the time to appeal has expired and as to which no appeal, petition for rehearing or petition for certiorari is pending (or if such appeal has been filed or any such petition has been granted, it has been finally decided and such judgment, order or other decree has not been reversed or stayed).

"JCP No. 1072" means Judicial Council Proceeding No. 1072, presently pending in the Superior Court of the State of California, County of San Francisco, which includes the JM Included Action.

"JM Debtors" means Johns-Manville Corporation and each' of its Affiliates which filed a petition for reorganization under Chapter 11 of the Code with this Court on August 26, 1982, unless such corporation has had or will have a plan of reorganization confirmed by an order of this Court which is a Final Order prior to the Plan Confirmation Date.

"JM Group" means the JM Insureds and the present, former or future directors, officers and employees of one or more JM Insureds.

"JM Included Action" means that portion of JCP No. 1072 represented by the allegations and claims of the JM Plaintiffs against the Settling Insurer and the allegations and claims of the Settling Insurer against the JM Plaintiffs.

"JM Insureds" means Manville Corporation, the JM Plaintiffs and each other Person (except natural persons) who was or is an Affiliate of Manville Corporation or Johns-Manville Corporation.

"JM Plaintiffs" means Johns-Manville Corporation, Johns-Manville Sales Corporation, Johns-Manville International Corporation, Johns-Manville Canada Inc. (now known as JM Asbestos Inc.) and Johns-Manville Amiante Canada Inc. (now known as JM Asbestos Inc.), each of which is a named plaintiff in JCP No. 1072.

"Person" means an individual, a corporation, a partnership, an association, a trust or any other entity or organization, including, without limitation, any government or political subdivision or an agency or instrumentality thereof.

"Plan" means the Joint Plan of Reorganization, dated October 17, 1983, of the JM Debtors, as filed with this Court on November 21, 1983, and as amended, modified or superseded from time to time, in the form in which it is confirmed by an order of this Court which is a Final Order.

"Plan Confirmation Date" means the date on which the Plan Confirmation Order becomes a Final Order.

"Plan Confirmation Order" means the order entered by this Court confirming the Plan.

"Policies" mean the following insurance policies issued by the Settling Insurer to the JM

Insureds: Policy Nos. 619, 829, 930, 1-245 and 1-G10.

"Policy Claims" means any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be asserted by any Person against any or all members of the JM Group or against any or all members of the Settling Insurer Group based upon, arising out of or relating to the Policies.

"Settlement Agreement" means the Settlement Agreement dated as of May 22, 1985, between the Settling Insurer, on the one hand, and Manville Corporation, et al., on the other hand.

"Settlement Amount" means $1,300,000, consisting of two installment payments of $800,000 on the Effective Date, and $500,000 on or before March 3, 1986.

"Settlement Fund" means the Escrow Property upon its release (other than because of termination of the Settlement Agreement in accordance with its terms) from the Escrow Account in accordance with the provisions of the Escrow Agreement, and all investment income thereon and gains or losses attributable thereto after such release.

"Settling Insurer" means Peerless Casualty Company, now known as Peerless Insurance Company, on behalf of itself and each of its Affiliates.

"Settling Insurer Group" means the Settling insurer and its present or former Affiliates, and present, former or future directors, officers, and employees.

Where the context so requires, each defined term stated in a singular form shall include the

plural form, and each defined term stated in a plural form shall include the singular form.

15.2 *Orders.*

(A) The disposition of the Settlement Fund is subject to the jurisdiction and further order of this Court;

(B) any and all claims, charges or encumbrances which might otherwise have been assessable or assertable by any Person against or with respect to the JM Group's rights and interests based upon, arising out of or related to any or all of the Policies, and any and all claims or causes of action in law, equity, admiralty or otherwise based upon, arising out of, or related to any or all of the Policies or which were or are assessable or assertable by any Person against any or all of the Policies or any or all members of the Settling Insurer Group, are transferred, and shall attach, solely to the Settlement Fund;

(C) upon the release (other than because of the termination of the Settlement Agreement in accordance with its terms) of the Escrow Property from the Escrow Account pursuant to the terms of the Settlement Agreement and the Escrow Agreement, the Settling Insurer and its Settling Insurer Group shall have no further duties or obligations based upon, arising out of or related to the Policies and shall thereafter be released from any and all Policy Claims by any Person, and all of the Policies of any or all members of such Settling Insurer Group shall upon such release be exhausted by virtue of such release and shall thereupon be null and void and of no further force or effect;

(D) upon the release (other than because of the termination of the Settlement Agreement in accordance with its terms) of the Escrow Property from the Escrow Account pursuant to the terms of the Settlement Agreement and the Escrow Agreement, all Persons are restrained and enjoined from commencing and/or continuing any suit, arbitration or other proceeding of any type or nature for Policy Claims against any or all members of the Settling Insurer Group (it being understood that cross-claims which are unrelated to Policy Claims and which are asserted by any party to JCP No. 1072 against the Settling Insurers are excluded from this clause (D)), except that no Person who asserted prior to the date this Order becomes a Final Order a claim or cause of action against one or more of the Settling Insurer Group seeking any and all damages (other than or in addition to policy proceeds) for bad faith or other insurer misconduct alleged in connection with the handling or disposition of claims is enjoined from proceeding only with respect to such claim or cause of action; and

(E) the JM Plaintiffs are authorized to dismiss, unconditionally and with prejudice (unless the Settlement Agreement shall otherwise be terminated in accordance with its terms), both of the following: (i) the claims of the JM Plaintiffs against the Settling Insurers asserted or assertable in the JM Included Action, and (ii) the JM Included Action itself.

16. IT IS HEREBY FURTHER ORDERED AND ADJUDGED AND DECREED with respect to the

Settlement Agreement dated as of March 27, 1986, between Prudential Reinsurance Company, on the one hand, and Manville Corporation, et al., on the other hand, that:

16.1 *Definitions.* As used in this Paragraph and Paragraph 16.2 below, the following defined terms have the following meanings:

"Affiliate" of another Person means any Person directly or indirectly controlling, controlled by, or under common control with, such other Person. The term "controlling" (including, with correlative meaning, the terms "controlled by" or "under common control with"), as used with respect to any Person, shall mean the possession, directly or indirectly, of the power to cause the direction of the management and policies of such Person, whether through the ownership of securities, by contract or otherwise.

"Code" means the laws of the United States relating to bankruptcy or reorganization, including, without limitation, Title 11 of the United States Code, 11 U.S.C. §§ 101 et *sec.*, as amended.

"Effective Date" means March 27, 1986.

"Final Order" means a judgment, order or other decree approved or entered by any State or Federal Court (including, without limitation, this Court) located in one of the States, or the District of Columbia, which judgment, order or other decree has not been reversed or stayed and as to which the time to appeal has expired and as to which no appeal, petition for rehearing or petition for certiorari is pending (or if such appeal has been filed or any such petition has been granted, it has been finally decided and such

judgment, order or other decree has not been reversed or stayed).

"JCP No. 1072" means Judicial Council Proceeding No. 1072, presently pending in the Superior Court of the State of California, County of San Francisco, which includes the JM Included Action.

"JM Debtors" means Johns-Manville Corporation and each of its Affiliates which filed a petition for reorganization under Chapter 11 of the Code with this Court on August 26, 1982, unless such corporation has had or will have a plan of reorganization confirmed by an order of this Court which is a Final Order prior to the Plan Confirmation Date.

"JM Group" means the JM Insureds and the present, former and future directors, officers and employees of each of one or more JM Insureds.

"JM Included Action" means that portion of JCP No. 1072 represented by the allegations and claims of the JM Plaintiffs against the Settling Insurer with respect to the Policies and the allegations and claims of the Settling Insurer against the JM Plaintiffs with respect to the Policies.

"JM Insureds" means Manville Corporation, the JM Plaintiffs and each other Person (except natural persons) who was or is an Affiliate of Manville Corporation or Johns-Manville Corporation.

"JM Plaintiffs" means Johns-Manville Corporation, Johns-Manville Sales Corporation (now known as Manville Sales Corporation), Johns-Manville International Corporation, Johns-Manville Canada Inc. (now known as JM

Asbestos Inc.) and Johns-Manville Amiante Canada Inc. (now known as JM Asbestos Inc.), each of which is a named plaintiff in JCP No. 1072.

"Person" means an individual, a corporation, a partnership, an association, a trust or any other entity or organization, including, without limitation, any government or political subdivision or an agency or instrumentality thereof.

"Plan" means the First Amended and Restated Plan of Reorganization, dated February 14, 1986, of the JM Debtors, as filed with this Court on February 14, 1986, and as amended, modified or superseded from time to time, in the form in which it is confirmed by a Final Order of this Court.

"Plan Confirmation Date" means the date on which the Plan Confirmation Order becomes a Final Order.

"Plan Confirmation Order" means the order entered by this Court confirming the Plan.

"Policies" means the following insurance policies issued by the Settling Insurer to the JM Insureds:

Policy Number	Policy Periods (for information only)
DXC 90 1143	7/01/76 - 7/01/77
DXC DX 0308	7/01/77 - 7/01/78
DXC DX 1109	7/01/78 - 7/01/79

"Policy Claims" means any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be, asserted by any Person against any or all mem-

bers of the JM Group or against any or all members of the Settling Insurer Group based upon, arising out of or relating to the Policies.

"Settlement Agreement" means the Settlement Agreement dated as of March 27, 1986, between the Settling Insurer, on the one hand, and Manville Corporation, et al., on the other hand.

"Settlement Amount" means Seven Million Nine Hundred Thirty-Seven Thousand Five Hundred Dollars ($7,937,500).

"Settlement Fund" means the Settlement Amount upon its deposit with (or in accordance with the written instructions of) the Clerk of this Court in accordance with the provisions of Paragraph 2 of the Settlement Agreement, and all investment income thereon and gains or losses attributable thereto after any such deposit.

"Settling Insurer" means Prudential Reinsurance Company.

"Settling Insurer Group" means the Settling Insurer and each of its present, former and future directors, officers, and employees.

Where the context so requires, each defined term stated in a singular form shall include the plural form, and each defined term stated in a plural form shall include the singular form.

16.2 *Orders.*

(A) The disposition of the Settlement Fund is subject to the jurisdiction and further order of this Court;

(B) unless and until the Settlement Agreement terminates, any and all claims, charges or encumbrances which might otherwise have been assessable or assertable by any Person against or with

respect to the JM Group's rights and interests based upon, arising out of or related to the Policies, and any and all claims or causes of action in law, equity, admiralty or otherwise based upon, arising out of, or related to the Policies or which were or are assessable or assertable by any Person against the Policies or any or all members of the Settling Insurer Group, are transferred, and shall attach, solely to the Settlement Fund;

(C) unless and until the Settlement Agreement terminates, upon the Effective Date, the Settling Insurer and its Settling Insurer Group shall have no duties or obligations after the Effective Date based upon, arising out of or related to the Policies (including but not limited to liability for excess workers compensation liability, property damage liability, general liability and any and all other liability) and shall thereafter be released from any and all Policy Claims by any Person, and the Policies shall thereafter be deemed exhausted and shall thereupon be null and void and of no further force or effect;

(D) unless and until the Settlement Agreement terminates, all Persons are restrained and enjoined from commencing and/or continuing any suit, arbitration or other proceeding of any type or nature with respect to Policy Claims against any or all members of the Settling Insurer Group (it being understood that cross-claims which are unrelated to Policy Claims and which are asserted by any party to JCP No. 1072 against the Settling Insurer are excluded from this clause (D)), except that no Person who asserted prior to the date this Order becomes a Final

Order a claim or cause of action against one or more of the Settling Insurer Group seeking any and all damages (other than or in addition to policy proceeds) for bad faith or other insurer misconduct alleged in connection with the handling or disposition of claims is enjoined from proceeding only with respect to such claim or cause of action; *provided, however,* that any Person who (i) asserts such a claim or cause of action where the alleged act or acts or failure or failures to act upon which such claim or cause of action is based arose after the date of this Order and/or who (ii) asserts a claim or cause of action against the Settlement Fund or files a proof of claim for, or receives, a payment under the Plan is so restrained and enjoined from commencing or continuing any such action against any or all members of the Settling Insurer Group; and

(E) upon payment of the Settlement Amount in accordance with the terms and provisions of the Settlement Agreement, the JM Plaintiffs are authorized to dismiss, unconditionally and with prejudice (unless the Settlement Agreement shall otherwise be terminated in accordance with its terms), both of the following: (i) the claims of the JM Plaintiffs against the Settling Insurer asserted or assertable in the JM Included Action, and (ii) the JM Included Action itself.

17. IT IS HEREBY FURTHER ORDERED AND ADJUDGED AND DECREED with respect to the Settlement Agreement dated as of May 28, 1986, between Puritan Insurance Company, on the one hand, and Manville Corporation, et al., on the other hand, that:

17.1 *Definitions.* As used in this Paragraph and Paragraph 17.2 below, the following defined terms have the following meanings:

"Affiliate" of another Person means any Person directly or indirectly controlling, controlled by, or under common control with, such other Person. The term "controlling" (including, with correlative meaning, the terms "controlled by" or "under common control with"), as used with respect to any Person, shall mean the possession, directly or indirectly, of the power to cause the direction of the management and policies of such Person, whether through the ownership of securities, by contract or otherwise.

"Code" means the laws of the United States relating to bankruptcy or reorganization, including, without limitation, Title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.*, as amended.

"Effective Date" means May 28, 1986.

"Final Order" means a judgment, order or other decree approved or entered by any State or Federal Court (including, without limitation, this Court) located in one of the States, or the District of Columbia, which judgment, order or other decree has not been reversed or stayed and as to which the time to appeal has expired and as to which no appeal, petition for rehearing or petition for certiorari is pending (or if such appeal has been filed or any such petition has been granted, it has been finally decided and such judgment, order or other decree has not been reversed or stayed).

"JCP No. 1072" means Judicial Council Proceeding No. 1072, presently pending in the Superior Court of the State of California, County of

San Francisco, which includes the JM Included Action.

"JM Debtors" means Johns-Manville Corporation and each of its Affiliates which filed a petition for reorganization under Chapter 11 of the Code with this Court on August 26, 1982, unless such corporation has had or will have a plan of reorganization confirmed by an order of this Court which is a Final Order prior to the Plan Confirmation Date.

"JM Group" means the JM Insureds and the present, former and future directors, officers and employees of each of one or more JM Insureds.

"JM Included Action" means that portion of JCP No. 1072 represented by the allegations and claims of the JM Plaintiffs against the Settling Insurer with respect to the Policies and the allegations and claims of the Settling Insurer against the JM Plaintiffs with respect to the Policies.

"JM Insureds" means Manville Corporation, the JM Plaintiffs and each other Person (except natural persons) who was or is an Affiliate of Manville Corporation or Johns-Manville Corporation.

"JM Plaintiffs" means Johns-Manville Corporation, Johns-Manville Sales Corporation (now known as Manville Sales Corporation), Johns-Manville International Corporation, Johns-Manville Canada Inc. (now known as JM Asbestos Inc.) and Johns-Manville Amiante Canada Inc. (now known as JM Asbestos Inc.), each of which is a named plaintiff in JCP No. 1072.

"Person" means an individual, a corporation, a partnership, an association, a trust or any other entity or organization, including, without limitation, any government or political subdivision or an agency or instrumentality thereof.

"Plan" means the First Amended and Restated Plan of Reorganization, dated February 14, 1986, of the JM Debtors, as filed with this Court on February 14, 1986, and as amended, modified or superseded from time to time, in the form in which it is confirmed by a Final Order of this Court.

"Plan Confirmation Date" means the date on which the Plan Confirmation Order becomes a Final Order.

"Plan Confirmation Order" means the order entered by this Court confirming the Plan.

"Policies" means the following insurance policies issued by the Settling Insurer to the JM Insureds:

Policy Number	Policy Periods (for information only)
ML 65 0094	7/01/76 - 7/01/77
ML 65 0313	3/01/77 - 7/01/77
ML 65 0355	7/01/77 - 7/01/78

"Policy Claims" means any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be, asserted by any Person against any or all members of the JM Group or against any or all members of the Settling Insurer Group based upon, arising out of or relating to the Policies.

"Settlement Agreement" means the Settlement Agreement dated as of May 28, 1986, between the Settling Insurer, on the one hand, and Manville Corporation, et al., on the other hand.

"Settlement Amount" means Seven Million Five Hundred Thousand Dollars ($7,500,000).

"Settlement Fund" means the Settlement Amount upon its deposit with (or in accordance with the written instructions of) the Clerk of this Court in accordance with the provisions of Paragraph 2 of the Settlement Agreement, and all investment income thereon and gains or losses attributable thereto after any such deposit.

"Settling Insurer" means Puritan Insurance Company.

"Settling Insurer Group" means the Settling Insurer and each of its present, former and future directors, officers, and employees.

Where the context so requires, each defined term stated in a singular form shall include the plural form, and each defined term stated in a plural form shall include the singular form.

17.2 *Orders.*

(A) The disposition of the Settlement Fund is subject to the jurisdiction and further order of this Court;

(B) unless and until the Settlement Agreement terminates, any and all claims, charges or encumbrances which might otherwise have been assessable or assertable by any Person against or with respect to the JM Group's rights and interests based upon, arising out of or related to the Policies, and any and all claims or causes of action in law, equity, admiralty or otherwise

based upon, arising out of, or related to the Policies or which were or are assessable or assertable by any Person against the Policies or any or all members of the Settling Insurer Group, are transferred, and shall attach, solely to the Settlement Fund;

(C) unless and until the Settlement Agreement terminates, upon the Effective Date, the Settling Insurer and its Settling Insurer Group shall have no duties or obligations after the Effective Date based upon, arising out of or related to the Policies (including but not limited to liability for excess workers compensation liability, property damage liability, general liability and any and all other liability) and shall thereafter be released from any and all Policy Claims by any Person, and the Policies shall thereafter be deemed exhausted and shall thereupon be null and void and of no further force or effect;

(D) unless and until the Settlement Agreement terminates, all Persons are restrained and enjoined from commencing and/or continuing any suit, arbitration or other proceeding of any type or nature with respect to Policy Claims against any or all members of the Settling Insurer Group (it being understood that cross-claims which are unrelated to Policy Claims and which are asserted by any party to JCP No. 1072 against the Settling Insurer are excluded from this clause (D)), except that no Person who asserted prior to the date this Order becomes a Final Order a claim or cause of action against one or more of the Settling Insurer Group seeking any and all damages (other than or in addition to pol-

icy proceeds) for bad faith or other insurer misconduct alleged in connection with the handling or disposition of claims is enjoined from proceeding only with respect to such claim or cause of action; *provided, however*, that any Person who (i) asserts such a claim or cause of action where the alleged act or acts or failure or failures to act upon which such claim or cause of action is based arose after the date of this Order and/or who (ii) asserts a claim or cause of action against the Settlement Fund or files a proof of claim for, or receives, a payment under the Plan is so restrained and enjoined from commencing or continuing any such action against any or all members of the Settling Insurer Group; and

(E) upon payment of the Settlement Amount in accordance with the terms and provisions of the Settlement Agreement, the JM Plaintiffs are authorized to dismiss, unconditionally and with prejudice (unless the Settlement Agreement shall otherwise be terminated in accordance with its terms), both of the following: (i) the claims of the JM Plaintiffs against the Settling Insurer asserted or assertable in the JM Included Action, and (ii) the JM Included Action itself.

18. IT IS HEREBY FURTHER ORDERED AND ADJUDGED AND DECREED with respect to the Settlement Agreement dated as of April 24, 1986, between Reliance Insurance Company (on behalf of itself and as successor in interest to Standard Accident Insurance Company), on the one hand, and Manville Corporation, et al., on the other hand, that:

18.1 *Definitions.* As used in this Paragraph and in Paragraph 18.2 below, the following defined terms have the following meanings:

"Affiliate" of another Person means any Person directly or indirectly controlling, controlled by, or under common control with, such other Person. The term "controlling" (including, with correlative meaning, the terms "controlled by" or "under common control with"), as used with respect to any Person, shall mean the possession, directly or indirectly, of the power to cause the direction of the management and policies of such Person, whether through the ownership of securities, by contract or otherwise.

"Applicable Rate" means, for each one-year period or portion thereof during the period from April 1, 1986 to the Payment Date, the rate determined on April 1 of each calendar year, or the first Business Day thereafter, commencing April 1, 1986, equal to the most recently auctioned per annum market discount rate for fifty-two week U.S. Treasury bills, as published by the Board of Governors of the Federal Reserve System, plus one-half of one percent (1/2%).

"Business Day" means (i) with respect to deposits with this Court, any day on which this Court is open, and (ii) with respect to any other usage, any day except a Saturday, Sunday or other day on which commercial banks in New York City are authorized by law to close.

"Code" means the laws of the United States relating to bankruptcy or reorganization, including, without limitation, Title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.*, as amended.

"Final Order" means a judgment, order or other decree approved or entered by any State or Federal Court (including, without limitation, this Court) located in one of the States, or the District of Columbia, which judgment, order or other decree has not been reversed or stayed and as to which the time to appeal has expired and as to which no appeal, petition for rehearing or petition for certiorari is pending (or if such appeal has been filed or any such petition has been granted, it has been finally decided and such judgment, order or other decree has not been reversed or stayed).

"JCP No. 1072" means Judicial Council Proceeding No. 1072, presently pending in the Superior Court of the State of California, County of San Francisco, which includes the JM Included Action.

"JM Debtors" means Johns-Manville Corporation and each of its Affiliates which filed a petition for reorganization under Chapter 11 of the Code with this Court on August 26, 1982, unless such corporation has had or will have a plan of reorganization confirmed by an order of this Court which is a Final Order prior to the Plan Confirmation Date.

"JM Group" means the JM Settling Parties and the present, former and future directors, officers and employees of each of one or more of the JM Settling Parties.

"JM Included Action" means that portion of JCP No. 1072 represented by all of the allegations and claims of the JM Plaintiffs against the Settling Insurer and all of the allegations and

claims of the Settling Insurer against the JM Plaintiffs.

"JM Plaintiffs" means Johns-Manville Corporation, Johns-Manville Sales Corporation (now known as Manville Sales Corporation), Johns-Manville International Corporation, Johns-Manville Canada Inc. (now known as JM Asbestos Inc.) and Johns-Manville Amiante Canada Inc. (now known as JM Asbestos Inc.), each of which is a named plaintiff in JCP No. 1072.

"JM Settling Parties" means Manville Corporation, the JM Plaintiffs and each other Person (except natural persons) who was or is an Affiliate of Manville Corporation or Johns-Manville Corporation.

"Payment Date" means three (3) Business Days after receipt by the Settling Insurer of notice from Manville Corporation pursuant to Paragraph 2(c) of the Settlement Agreement that the Plan Confirmation Date has occurred.

"Person" means an individual, a corporation, a partnership, an association, a trust or any other entity or organization, including, without limitation, any government or political subdivision or an agency or instrumentality thereof.

"Plan" means the First Amended and Restated Plan of Reorganization, dated February 14, 1986, of the JM Debtors, as filed with this Court on February 14, 1986, and as amended, modified or superseded from time to time, in the form in which it is confirmed by a Final Order of this Court.

"Plan Confirmation Date" means the date on which the Plan Confirmation Order becomes a Final Order.

"Plan Confirmation Order" means the order entered by this Court confirming the Plan.

"Policies" means all policies which are at issue in the JM Included Action issued by Standard Accident Insurance Company, to whom Reliance Insurance Company is the successor in interest, and any other third party liability policy heretofore alleged or which may hereafter be alleged to have been issued by the Settling Insurer to Johns-Manville Corporation or any of the JM Settling Parties at any time.

"Policy Claims" means any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be asserted by any Person against any or all members of the JM Group or against any or all members of the Settling Insurer Group based upon, arising out of or relating to the Policies.

"Settlement Agreement" means the Settlement Agreement dated as of April 24, 1986, between the Settling Insurer, on the one hand, and Manville Corporation, et al., on the other hand.

"Settlement Amount" means Five Hundred Ninety-Two Thousand Six Hundred Forty-Five Dollars ($592,645), plus interest accrued thereon at the Applicable Rate from (and including) April 1, 1986 until (and excluding) the Payment Date.

"Settlement Fund" means the Settlement Amount upon its deposit with (or in accordance with the written instructions of) the Clerk of this Court in accordance with the provisions of Paragraph 2(c) of the Settlement Agreement, and all investment income thereon and gains or losses attributable thereto after any such deposit.

"Settling Insurer" means the Reliance Insurance Company, on behalf of itself and as successor in interest to Standard Accident Insurance Company.

"Settling Insurer Group" means the Settling Insurer and its present and former Affiliates, and each of their present, former and future directors, officers, and employees.

"Settling Insurer Release" means a Release to be executed by the Settling Insurer on behalf of itself and its successors and assigns, substantially in the form attached as Exhibit C to the Settlement Agreement.

Where the context so requires, each defined term stated in a singular form shall include the plural form, and each defined term stated in a plural form shall include the singular form.

18.2 *Orders.*

(A) The disposition of the Settlement Fund is subject to the jurisdiction and further order of this Court;

(B) any and all claims, charges or encumbrances which might otherwise have been assessable or assertable by any Person against or with respect to the JM Group's rights and interests based upon, arising out of or related to the Policies, and any and all claims or causes of action in law, equity, admiralty or otherwise based upon, arising out of, or related to the Policies or which were or are assessable or assertable by any Person against the Policies or any or all members of the Settling Insurer Group, are transferred, and shall attach, solely to the Settlement Fund;

(C) upon payment by the Settling Insurer of its Settlement Amount in accordance with the terms and provisions of the Settlement Agreement, the Settling Insurer and its Settling Insurer Group shall have no further duties or obligations based upon, arising out of or related to the Policies and shall thereafter be released from any and all Policy Claims by any Person, and the Policies shall, upon such payment, be exhausted by payment of such Settlement Amount and shall thereupon be null and void and of no further force or effect;

(D) all Persons are restrained and enjoined from commencing and/or continuing any suit, arbitration or other proceeding of any type or nature with respect to Policy Claims against any or all members of the Settling Insurer Group (it being understood that cross-claims which are unrelated to Policy Claims and which are asserted by any party to JCP No. 1072 against the Settling Insurer are excluded from this clause (D)), except that no Person who asserted prior to the date this Order becomes a Final Order a claim or cause of action against one or more of the Settling Insurer Group seeking any and all damages (other than or in addition to policy proceeds) for bad faith or other insurer misconduct alleged in connection with the handling or disposition of claims is enjoined from proceeding only with respect to such claim or cause of action; *provided, however,* that any Person who (i) asserts such a claim or cause of action where the alleged act or acts or failure or failures to act upon which such claim or cause of action is based arose after the date of this Order and/or who (ii)

asserts a claim or cause of action against the Settlement Fund or files a proof of claim for, or receives, a payment under the Plan is so restrained and enjoined from commencing or continuing any such action against any or all members of the Settling Insurer Group; and

(E) upon execution and delivery of the Settling Insurer Release in accordance with the terms and provisions of the Settlement Agreement, the JM Plaintiffs are authorized to dismiss, unconditionally and with prejudice (unless the Settlement Agreement shall otherwise be terminated in accordance with its terms), both of the following: (i) the claims of the JM Plaintiffs against the Settling Insurer asserted or assertable in the JM Included Action, and (ii) the JM Included Action itself.

19. IT IS HEREBY FURTHER ORDERED AND ADJUDGED AND DECREED with respect to the Settlement Agreement dated as of October 21, 1985, between Rocky Mountain International Insurance Ltd., on the one hand, and Manville Corporation, et al., on the other hand, that:

19.1 *Definitions.* As used in this Paragraph and Paragraph 19.2 below, the following defined terms have the following meanings:

"Affiliate" of another Person means any Person directly or indirectly controlling, controlled by, or under common control with, such other Person; *provided, however,* that any reference to "Affiliates" of Manville Corporation, the JM Debtors or the JM Insureds shall not be deemed to include Rocky Mountain International Insurance Ltd. The term "controlling" (including, with correla-

tive meaning, the terms "controlled by" or "under common control with"), as used with respect to any Person, shall mean the possession, directly or indirectly, of the power to cause the direction of the management and policies of such Person, whether through the ownership of securities, by contract or otherwise.

"Business Day" means any day except a Saturday, Sunday or other day on which commercial banks in New York City are authorized by law to close.

"Code" means the laws of the United States relating to bankruptcy or reorganization, including, without limitation, Title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.*, as amended.

"Final Order" means a judgment, order or other decree approved or entered by any State or Federal Court (including, without limitation, this Court) located in one of the States, or the District of Columbia, which judgment, order or other decree has not been reversed or stayed and as to which the time to appeal has expired and as to which no appeal, petition for rehearing or petition for certiorari is pending (or if such appeal has been filed or any such petition has been granted, it has been finally decided and such judgment, order or other decree has not been reversed or stayed).

"JCP No. 1072" means Judicial Council Proceeding No. 1072, presently pending in the Superior Court of the State of California, County of San Francisco, which includes the JM Included Action.

"JM Debtors" means Johns-Manville Corporation and each of its Affiliates which filed a petition for reorganization under Chapter 11 of the Code with this Court on August 26, 1982, unless such corporation has had or will have a plan of reorganization confirmed by an order of this Court which is a Final Order prior to the Plan Confirmation Date.

"JM Group" means the JM Insureds and the present, former and future directors, officers and employees of each of one or more JM Insureds.

"JM Included Action" means that portion of JCP No. 1072 represented by the allegations and claims of the JM Plaintiffs against the Settling Insurer with respect to the Policies and the allegations and claims of the Settling Insurer against the JM Plaintiffs with respect to the Policies.

"JM Insureds" means Manville Corporation, the JM Plaintiffs and each other Person (except natural persons) who was or is an Affiliate of Manville Corporation or Johns-Manville Corporation.

"JM Plaintiffs" means Johns-Manville Corporation, Johns-Manville Sales Corporation, Johns-Manville International Corporation, Johns-Manville Canada Inc. (now known as JM Asbestos Inc.) and Johns-Manville Amiante Canada Inc. (now known as JM Asbestos Inc.), each of which is a named plaintiff in JCP No. 1072.

"Payment Date" means the fifth Business Day immediately following the Plan Confirmation Date, or such other later day as the parties may agree.

"Person" means an individual, a corporation, a partnership, an association, a trust or any other

entity or organization, including, without limitation, any government or political subdivision or an agency or instrumentality thereof.

"Plan" means the Joint Plan of Reorganization, dated October 17, 1983, of the JM Debtors, as filed with this Court on November 21, 1983, and as amended, modified or superseded from time to time, in the form in which it is confirmed by a Final order of this Court.

"Plan Confirmation Date" means the date on which the Plan Confirmation Order becomes a Final Order.

"Plan Confirmation Order" means the order entered by this Court confirming the Plan.

"Policies" means insurance policy nos. 029003(77) (policy period July 1, 1977 - July 1, 1978) and 029004(78) (policy period July 1, 1978 - July 1, 1979), and only these policies, issued by the Settling Insurer to the JM Insureds.

"Policy Claims" means any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be, asserted by any Person against any or all members of the JM Group or against any or all members of the Settling Insurer Group based upon, arising out of or relating to the Policies.

"Settlement Agreement" means the Settlement Agreement dated as of October 21, 1985, between the Settling Insurer, on the one hand, and Manville Corporation, et al., on the other hand.

"Settlement Amount" means the sum of (i) Fourteen Million Two Hundred Seventy Thousand Dollars ($14,270,000) plus all accrued and unpaid interest thereon as of each December 31,

commencing December 31, 1985 (such aggregate amount, the "Base Amount") plus (ii) interest on the Base Amount, calculated on the basis of a 365-day year, accrued from July 1, 1985 until and including the Payment Date at a rate per annum, for each 6-month period or portion thereof commencing July 1, 1985, equal to the 6-month LIBOR as published in the Wall Street Journal on the first Business Day of such 6-month period.

"Settlement Fund" means the Settlement Amount upon its deposit with (or in accordance with the written instructions of) the Clerk of this Court in accordance with the provisions of Paragraph 2 of the Settlement Agreement, and all investment income thereon and gains or losses attributable thereto after any such deposit.

"Settling Insurer" means Rocky Mountain International Insurance Ltd.

"Settling Insurer Group" means the Settling Insurer and each of its present, former and future directors, officers, and employees.

Where the context so requires, each defined term stated in a singular form shall include the plural form, and each defined term stated in a plural form shall include the singular form.

19.2 *Orders.*

(A) The disposition of the Settlement Fund is subject to the jurisdiction and further order of this Court;

(B) any and all claims, charges or encumbrances which might otherwise have been assessable or assertable by any Person against or with respect to the JM Group's rights and interests

based upon, arising out of or related to the Policies, and any and all claims or causes of action in law, equity, admiralty or otherwise based upon, arising out of, or related to the Policies or which were or are assessable or assertable by any Person against the Policies or any or all members of the Settling Insurer Group, are transferred, and shall attach, solely to the Settlement Fund;

(C) upon payment by the Settling Insurer of its Settlement Amount in accordance with the terms and provisions of the Settlement Agreement, the Settling Insurer and its Settling Insurer Group shall have no further duties or obligations based upon, arising out of or related to the Policies and shall thereafter be released from any and all Policy Claims by any Person, and the Policies shall, upon such payment, be exhausted by payment of such Settlement Amount and shall thereupon be null and void and of no further force or effect;

(D) all Persons are restrained and enjoined from commencing and/or continuing any suit, arbitration or other proceeding of any type or nature for Policy Claims against any or all members of the Settling Insurer Group (it being understood that cross-claims which are unrelated to Policy Claims and which are asserted by any party to JCP No. 1072 against the Settling Insurer are excluded from this clause (D)), except that no Person who asserted prior to the date this Order becomes a Final order a claim or cause of action against one or more of the Settling Insurer Group seeking any and all damages (other than or in addition to policy proceeds) for bad faith or other insurer misconduct alleged in

connection with the handling or disposition of claims is enjoined from proceeding only with respect to such claim or cause of action; *provided, however*, that any Person who (i) asserts such a claim or cause of action where the alleged act or acts or failure or failures to act upon which such claim or cause of action is based arose after the date of this Order and/or who (ii) asserts a claim or cause of action against the Settlement Fund or files a proof of claim for, or receives, a payment under the Plan is so restrained and enjoined from commencing or continuing any such action against any or all members of the Settling Insurer Group; and

(E) the JM Plaintiffs are authorized to dismiss, unconditionally and with prejudice (unless the Settlement Agreement shall otherwise be terminated in accordance with its terms), both of the following: (i) the claims of the JM Plaintiffs against the Settling Insurer asserted or assertable in the JM Included Action, and (ii) the JM Included Action itself.

20. IT IS HEREBY FURTHER ORDERED AND ADJUDGED AND DECREED with respect to the Settlement Agreement dated as of October 10, 1986, between Rocky Mountain International Insurance Ltd., on the one hand, and Manville Corporation, et al., on the other hand, that:

20.1 *Definitions.* As used in this Paragraph and Paragraph 20.2 below, the following defined terms have the following meanings:

"Affiliate" of another Person means any Person directly or indirectly controlling, controlled by, or under common control with, such other Person;

provided, however, that any reference to "Affiliates" of Manville Corporation, the JM Debtors or the JM Insureds shall not be deemed to include Rocky Mountain International Insurance Ltd. The term "controlling" (including, with correlative meaning, the terms "controlled by" or "under common control with"), as used with respect to any Person, shall mean the possession, directly or indirectly, of the power to cause the direction of the management and policies of such Person, whether through the ownership of securities, by contract or otherwise.

"Aggregate Limit of Liability" means (subject to increase or reinstatement in accordance with the provisions of Paragraph 5 of the Settlement Agreement) one million dollars ($1,000,000).

"Code" means the laws of the United States relating to bankruptcy or reorganization, including, without limitation, Title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* as amended.

"Final Order" means a judgment, order or other decree approved or entered by any State or Federal court (including, without limitation, this Court) located in one of the States, the territories of the United States, or the District of Columbia, which judgment, order or other decree has not been reversed or stayed and as to which the time to appeal has expired and as to which no appeal, petition for hearing, petition for rehearing or petition for certiorari is pending (or if such appeal has been filed or any such petition has been granted, it has been finally decided and such judgment, order or other decree has not been reversed or stayed).

"JCP No. 1072" means Judicial Council Coordination Proceeding No. 1072, presently pending in the Superior Court of the State of California, City and County of San Francisco, which includes the JM Included Action.

"JM Debtors" means Johns-Manville Corporation and each of its Affiliates which filed a petition for reorganization under Chapter 11 of the Code with this Court on August 26, 1982, unless such corporation has had or will have a plan of reorganization confirmed by an order of this Court which is a Final Order prior to the Plan Confirmation Date.

"JM Group" means the JM Insureds and the present, former and future directors, officers and employees of one or more JM Insureds.

"JM Included Action" means that portion of JCP No. 1072 represented by the allegations and claims of the JM Plaintiffs against the Settling Insurer with respect to the Policy and the allegations and claims of the Settling Insurer against the JM Plaintiffs with respect to the Policy.

"JM Insureds" means Manville Corporation, the JM Plaintiffs and each other Person (except natural persons) who is an Affiliate of Manville Corporation or Johns-Manville Corporation.

"JM Plaintiffs" means Johns-Manville Corporation, Johns-Manville Sales Corporation (now known as Manville Sales Corporation), Johns-Manville International Corporation, Johns-Manville Canada Inc. (now known as JM Asbestos Inc.) and Johns-Manville Amiante Canada Inc. (now known as JM Asbestos Inc.),

each of which is a named plaintiff in JCP No. 1072.

"Person" means an individual, a corporation, a partnership, an association, a trust or any other entity or organization, including, without limitation, any government or political subdivision or an agency or instrumentality thereof.

"Plan" means the revised form of the Second Amended and Restated Plan of Reorganization of Manville Corporation dated May 23, 1986, as filed with this Court on June 4, 1986, and as amended, modified or superseded from time to time, in the form in which it is confirmed by a Final Order of this Court.

"Plan Confirmation Date" means the date on which the Plan Confirmation order becomes a Final Order.

"Plan Confirmation Order" means the order entered by this Court confirming the Plan.

"Policy" means the following insurance policy (and only the following insurance policy) issued by the Settling Insurer to the JM Insureds:

Policy Number	Policy Periods (for information only)
29002	7/1/77-7/1/78

"Policy Claims" means any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be, asserted by any Person against any or all members of the JM Group or against any or all members of the Settling Insurer Group based upon, arising out of, or relating to the Policy.

"Settlement Agreement" means the Settlement Agreement dated as of October 10, 1986, between Rocky Mountain International Insurance Ltd., on the one hand, and Manville Corporation, et al., on the other hand.

"Settling Insurer" means Rocky Mountain International Insurance Ltd.

"Settling Insurer Group" means the Settling Insurer and each of its present, former and future directors, officers and employees.

Where the context so requires, each defined term stated in a singular form shall include the plural form and each defined term stated in a plural form shall include the singular form.

20.2 *Orders.*

(A) Unless and until the Settlement Agreement terminates, at and after the date of this Order, the Settling Insurer shall have no duties or obligations to any Person based upon, arising out of or related to the Policy except as may be imposed by the Settlement Agreement;

(B) unless and until the Settlement Agreement terminates, upon payment by the Settling Insurer of the Aggregate Limit of Liability in accordance with the terms and provisions of the Settlement Agreement, the Settling Insurer and the Settling Insurer Group shall have no further duties or obligations based upon, arising out of or related to the Policy and shall thereafter be released from any and all Policy Claims by any Person, and the Policy shall, upon such payment, be exhausted by payment of such amount and shall thereupon be null and void and of no further force or effect;

(C) unless and until the Settlement Agreement terminates, all Persons are restrained and enjoined from commencing and/or continuing any suit, arbitration or other proceeding of any type or nature for Policy Claims against any or all members of the Settling Insurer Group (it being understood that cross-claims which are unrelated to Policy Claims and which are asserted by any party to JCP No. 1072 against the Settling Insurer are excluded from this clause (C)), except that no Person who asserted prior to the date this Order becomes a Final Order a claim or cause of action against one or more of the Settling Insurer Group seeking any and all damages (other than or in addition to policy proceeds) for bad faith or other insurer misconduct alleged in connection with the handling or disposition of claims is enjoined from proceeding only with respect to such claim or cause of action; *provided, however,* that any Person who asserts such a claim or cause of action where the alleged act or acts or failure or failures to act upon which such claim or cause of action is based arose after the date of this Order and/or who files a proof of claim for, or receives, a payment under the Plan is so restrained and enjoined from commencing or continuing any such action against any or all members of the Settling Insurer Group; and

(D) upon payment by the Settling Insurer of an amount equal to the Aggregate Limit of Liability in accordance with the terms and provisions of the Settlement Agreement, the JM Plaintiffs are authorized to dismiss, unconditionally and with prejudice (unless the Settlement Agreement shall

otherwise be terminated in accordance with its terms), both of the following: (i) the claims between the JM Plaintiffs, on the one hand, and the Settling Insurer, on the other hand, asserted or assertable in the JM Included Action, and (ii) the JM Included Action (with respect to such claims) itself.

21. IT IS HEREBY FURTHER ORDERED AND ADJUDGED AND DECREED with respect to the Settlement Agreement dated as of October 22, 1986, between Royale Belge, on the one hand, and Manville Corporation, et al., on the other hand, that:

21.1 *Definitions.* As used in this Paragraph and Paragraph 21.2 below, the following defined terms have the following meanings:

"Affiliate" of another Person means any Person directly or indirectly controlling, controlled by, or under common control with, such other Person. The term "controlling" (including, with correlative meaning, the terms "controlled by" or "under common control with") as used with respect to any Person, shall mean the possession, directly or indirectly, of the power to cause the direction of the management and policies of such Person, whether through the ownership of securities, by contract or otherwise.

"JCP No. 1072" means Judicial Council Proceeding No. 1072, presently pending in the Superior Court of the State of California, City and County of San Francisco.

"JM Group" means the JM Insureds and the present, former and future directors, officers and

employees of each of one or more of the JM Insureds.

"JM Insureds" means Manville Corporation, Johns-Manville Corporation, Johns-Manville Sales Corporation (now known as Manville Sales Corporation), Johns-Manville International Corporation, Johns-Manville Canada Inc. (now known as JM Asbestos Inc.), Johns-Manville Amiante Canada Inc. (now known as JM Asbestos Inc.), and each other Person (except natural persons) who is an Affiliate of Manville Corporation and Johns-Manville Corporation.

"Person" means an individual, a corporation, a partnership, an association, a trust or any other entity or organization, including, without limitation, any government or political subdivision or an agency or instrumentality thereof.

"Policies" means Royale Beige policy no. UPA 0273 (policy dates 7/01/82 to 7/01/83) and policy no. 1 251 223/81 (policy dates 7/01/81 to 7/01/82) issued by the Settling Insurer to the JM Insureds, as such policies may be modified, amended or supplemented to the date of the Settlement Agreement.

"Policy Claims" means any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be asserted by any Person against any or all members of the JM Group or against any or all members of the Settling Insurer Group based upon, arising out of or relating to the Policies.

"Settlement Agreement" means the Settlement Agreement dated as of October 22, 1986, between

the Settling Insurer, on the one hand, and Manville Corporation, et al., on the other hand.

"Settlement Amount" means Four Hundred Seventy Five Thousand Dollars (U.S. $475,000).

"Settlement Fund" means the Settlement Amount, together with all amounts paid by the Settling Insurer pursuant to Paragraph 5 of the Settlement Agreement, upon deposit of such amounts with (or in accordance with the written instructions of) the Clerk of this Court in accordance with the provisions of the Settlement Agreement and the Trust Agreement, and all investment income thereupon and gains or losses attributable thereto after any such deposit.

"Settling Insurer" means Royale Belge.

"Settling Insurer Group" means the Settling Insurer and its respective present or former Affiliates and each of their present, former and future directors, officers, stockholders (in their capacity as such), members, members' agents, insurance underwriters, and employees.

"Trust" means the trust established pursuant to Paragraphs 2 and 9 of the Settlement Agreement and administered pursuant to the Trust Agreement.

"Trust Agreement" means the trust agreement dated as of October 22, 1986 entered into by the parties hereto and Mellon Bank, N.A., a national banking association, the trustee under the Trust Agreement, with respect to the terms and provisions governing the administration of the Trust.

Where the context so requires, each defined term stated in a singular form shall include the plural form, and each defined term stated in a plural form shall include the singular form.

21.2 *Orders.*

(A) The disposition of the Settlement Fund is subject to the jurisdiction and further order of this Court;

(B) unless and until the Settlement Agreement terminates in accordance with the express provisions thereof, any and all claims, charges or encumbrances which might otherwise have been assessable or assertable by any Person against or with respect to the JM Group's rights and interests based upon, arising out of or related to any or all of the Policies, and any and all claims or causes of action in law, equity, admiralty or otherwise based upon, arising out or, or related to any or all of the Policies or which were or are assessable or assertable by any Person against any or all of the Policies or any or all members of the Settling Insurer Group are transferred, and shall attach, solely to the Settlement Fund;

(C) unless and until the Settlement Agreement terminates in accordance with the express provisions thereof, the Settling Insurer Group shall have no duties or obligations based upon, arising out of or related to the Policies, and shall be released from any Policy Claims by any Person and the Policies shall, upon deposit of the Settlement Amount with (or in accordance with the written instructions of) the Clerk of this Court, be deemed exhausted and shall thereupon be null and void and of no further force or effect as to any member of the Settling Insurer Group; and

(D) unless and until the Settlement Agreement terminates in accordance with the express pro-

visions thereof, all Persons are restrained and enjoined from commencing and/or continuing any suit, arbitration or other proceeding of any type or nature with respect to Policy Claims against any or all members of the Settling Insurer Group (it being understood that cross-claims asserted by any party to JCP No. 1072 against the Settling Insurer that are unrelated to Policy Claims are excluded from this clause (D)).

22. IT IS HEREBY FURTHER ORDERED AND ADJUDGED AND DECREED with respect to the Settlement Agreement dated as of April 23, 1986, between Sun Insurance Office, Limited, the London Assurance, and Sun Alliance Insurance Company, on the one hand, and Manville Corporation, et al., on the other hand, that:

22.1 *Definitions.* As used in this Paragraph and Paragraph 22.2 below, the following defined terms have the following meanings:

"Affiliate" of another Person means any Person directly or indirectly controlling, controlled by, or under common control with, such other Person, and includes any Person (except natural persons) referred to in the Policies by the word "Affiliated." The term "controlling" (including, with correlative meaning, the terms "controlled by" or "under common control with"), as used with respect to any Person, shall mean the possession, directly or indirectly, of the power to cause the direction of the management and policies of such Person, whether through the ownership of securities, by contract or otherwise.

"Allied" means any Person (except natural persons) referred to in the Policies by the word "Allied."

"Applicable Rate" means for each three-month period commencing on and including April 15, 1986 to and excluding the Payment Date (unless the interest accrual period is extended pursuant to Paragraph 2(i) of the Settlement Agreement), the rate determined on the first Business Day of such period equal to the per annum market discount rate for the most recently auctioned thirteen-week U.S. Treasury Bills, as published by the Board of Governors of the Federal Reserve System and quoted in the "Money Rates" column of the Wall Street Journal.

"Business Day" means (i) with respect to deposits with this Court, any day on which this Court is open, and (ii) with respect to any other usage, any day except a Saturday, Sunday or other day on which commercial banks in New York City are authorized by law to close.

"JCP No. 1072" means Judicial Council Proceeding No. 1072, presently pending in the Superior Court of the State of California, City and County of San Francisco, which includes the JM Included Action.

"JM Group" means the JM Insureds and the present, former and future directors, officers and employees of each of one or more of the JM Insureds.

"JM Included Action" means that portion of JCP No. 1072 represented by the allegations and claims of the JM Plaintiffs against the Settling Insurer Group with respect to the Policies and the allegations and claims of the Settling Insurer

Group against the JM Plaintiffs with respect to the Policies.

"JM Insureds" means Manville Corporation, the JM Plaintiffs and each other Person (except natural persons) who was or is a Subsidiary, Allied or Affiliate of Manville Corporation or Johns-Manville Corporation, and includes Canadian Johns-Manville Company Limited, sometimes referred to as Canadian Johns-Manville Co. Ltd., and any Allied, Affiliate or Subsidiary in which it has or had an interest, or any insured (except natural persons) as defined in the Policies.

"JM Plaintiffs" means Johns-Manville Corporation, Johns-Manville Sales Corporation (now known as Manville Sales Corporation), Johns-Manville International Corporation, Johns-Manville Canada Inc. (now known as JM Asbestos Inc.) and Johns-Manville Amiante Canada Inc. (now known as JM Asbestos Inc.), each of which is a named plaintiff in JCP No. 1072 and Johns-Manville Canada Inc., the named plaintiff in the Ontario Action.

"Ontario Action" means the judicial proceeding entitled *Johns-Manville Canada, Inc. v. Sun Alliance Insurance Company, Sun Insurance Office Limited, and The London Assurance,* Action No. 45279/79, presently pending in the Supreme Court of Ontario, in the municipality of Metropolitan Toronto, in the Province of Ontario, Canada.

"Payment Date" means seven (7) Business Days after Manville Corporation delivers the notice and a copy of the Order provided for in Para-

graph 2(d) of the Settlement Agreement to the Settling Insurer Group.

"Person" means an individual, a corporation, a partnership, an association, a trust or any other entity or organization, including, without limitation, any government or political subdivision or an agency or instrumentality thereof.

"Policies" means the following insurance policies (and only the following insurance policies) issued by Sun Insurance Office, Limited to the JM Insureds:

Policy Number	Policy Periods (for information only)
65 014	4/01/46 - 4/01/49
65 050	4/01/49 - 4/01/52
65 087	4/01/52 - 7/01/52
65 088	7/01/52 - 7/01/55
65 5115	7/01/55 - 7/01/58
65 8543	7/01/58 - 7/01/61
65 11550 (and renewal renewal numbers GRS 58011 and GRS 78063 to Policy Number 65 11550)	7/01/61 - 7/01/70

"Policy Claims" means any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be, asserted by any Person against any or all members of the JM Group or against any or all members of the Settling Insurer Group based upon, arising out of or relating to the Policies.

"Settlement Agreement" means the Settlement Agreement dated as of April 23, 1986 between

the Settling Insurer Group, on the one hand, and Manville Corporation, et al., on the other hand.

"Settlement Amount" means the sum of (i) Twenty-Seven Million Two Hundred Fifty Thousand United States Dollars (U.S. $27,250,000) (the "Base Amount") and (ii) interest, compounded quarterly, on the Base Amount at the Applicable Rate for the period commencing on and including April 15, 1986 and to but excluding the Payment Date.

"Settlement Fund" means the Settlement Amount, together with any interest payable pursuant to Paragraph 2(i) of the Settlement Agreement, upon the deposit thereof with (or in accordance with the written instructions of) the Clerk of this Court in accordance with the provisions of Paragraph 2(c) of the Settlement Agreement, and all investment income thereon and gains or losses attributable thereto after any such deposit.

"Settling Insurers" means Sun insurance office, Limited and The London Assurance.

"Settling Insurer Group" means the Settling Insurers and Sun Alliance Insurance Company.

"Subsidiary" means any Person (except natural persons) referred to in the Policies by the word "Subsidiary."

Where the context so requires, each defined term stated in a singular form shall include the plural form, and each defined term stated in a plural form shall include the singular form.

22.2 *Orders.*

(A) The disposition of the Settlement Fund is subject to the jurisdiction and further order of this Court;

(B) unless and until the Settlement Agreement terminates, any and all claims, charges or encumbrances which might otherwise have been assessable or assertable by any Person against or with respect to the JM Group's rights and interests based upon, arising out of or related to the Policies, and any and all claims or causes of action in law, equity, admiralty or otherwise based upon, arising out of, or related to the Policies or which were or are assessable or assertable by any Person against the Policies or any or all members of the Settling Insurer Group, are transferred, and shall attach, solely to the Settlement Fund;

(C) unless and until the Settlement Agreement terminates, the Settling Insurer Group shall have no further duties or obligations based upon, arising out of or related to the Policies and shall hereafter be released from any and all Policy Claims by any Person, and the Policies shall, upon payment of the Settlement Amount, be exhausted by payment of such amount and shall thereupon be null and void and of no further force or effect;

(D) unless and until the Settlement Agreement terminates, all Persons are restrained and enjoined from commencing and/or continuing any suit, arbitration or other proceeding of any type or nature with respect to Policy Claims against any or all members of the Settling Insurer Group (it being understood that cross-claims which are unrelated to Policy Claims and which are asserted by any party to JCP No. 1072 against

the Settling Insurers are excluded from this clause (D)); and

(E) upon payment of the Settlement Amount and any interest payable pursuant to Paragraph 2(i) of the Settlement Agreement in accordance with the terms and provisions of the Settlement Agreement, the JM Plaintiffs are authorized to dismiss, unconditionally and with prejudice (unless the Settlement Agreement shall otherwise be terminated in accordance with its terms), both of the following: (i) the claims of the JM Plaintiffs against the Settling Insurer Group asserted or assertable in the JM Included Action and the Ontario Action, and (ii) the JM Included Action and the Ontario Action themselves.

23. IT IS HEREBY DETERMINED with respect to the Settlement Agreement dated as of July 18, 1984, between the Settling Insurer Parties (all capitalized terms being used as defined in Paragraph 23.1 below), on the one hand, and Manville Corporation, et al., on the other hand, that:

(1) The Settling Insurer Parties issued or are or may be responsible for the Policies and the Policies constitute and include property of the JM Debtors' estate;

(2) serious and substantial disputes have arisen among Manville Corporation, the Settling Insurer Parties and others concerning the availability and extent of coverage and other obligations under the Policies;

(3) on March 31, 1980, the JM Plaintiffs commenced an action in the Superior Court of the State of California, for the City and County of

San Francisco, against the Settling Insurer Parties and other insurers of the JM Insureds, which action has been coordinated with other suits in JCP No. 1072;

(4) prior to the filing of the JM Debtors' petition for reorganization under Chapter 11 of the Code on August 26, 1982, lawsuits on behalf of more than 16,000 persons had been filed against the JM Group and/or its insurers, including one or more of the Settling Insurer Parties, claiming damages for asbestos-related claims, including (but not limited to) health, personal injury or property damage claims;

(5) no fewer than 6,000 additional lawsuits would have been commenced by January 1, 1984 against the JM Group and/or its insurers, but for the provisions of 11 U.S.C. 362(a) and the orders of this Court issued pursuant to 11 U.S.C. 362(a) and 105; and

(6) the settlement provided for in the Settlement Agreement is a fair and reasonable resolution of the disputes between Manville Corporation and the JM Plaintiffs and the Settling Insurer Parties regarding the Policies, and approval of the Settlement Agreement will materially enhance the JM Debtors' ability to successfully and effectively reorganize under Chapter 11 of the Code.

IT IS HEREBY FURTHER ORDERED AND ADJUDGED AND DECREED with respect to the Settlement Agreement dated as of July 18, 1984, between the Settling Insurer Parties, on the one hand, and Manville Corporation, et al., on the other hand, that:

23.1 *Definitions.* As used in this Paragraph and Paragraph 23.2 below, the following defined terms have the following meanings:

"Affiliate" of another Person means any Person directly or indirectly controlling, controlled by, or under common control with, such other Person, and shall include a Subsidiary. The term "controlling" (including, with correlative meaning, the terms "controlled by" or "under common control with"), as used with respect to any Person, shall mean the possession, directly or indirectly, of the power to cause the direction of the management and policies of such Person, whether through the ownership of securities, by contract or otherwise.

"Applicable Rate" means, for each one-year period or portion thereof, the rate determined on the first Business Day of such period equal to the most recently auctioned per annum market discount rate for one-year U.S. Treasury bills, as published by the Board of Governors of the Federal Reserve System, plus one (1%) percent.

"British Company" means (i) any company or corporation (as presently or previously constituted) which is or is alleged to be a subscribing insurer to one or more of the Policies listed on Exhibit A-3 to the Settlement Agreement and (ii) any company, corporation or other entity which is a party to the Settlement Agreement by reason of being successor, assignee or otherwise of a British Company and which is so listed on the signature pages of the Settlement Agreement.

"Business Day" means any day except a Saturday, Sunday or other day on which commercial

banks in New York City are authorized by law to close.

"Code" means the laws of the United States relating to bankruptcy or reorganization, including, without limitation, Title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.*, as amended.

"Dismissal Agreement" means the "Agreement for Dismissal of Litigation in Contemplation of Settlement" dated July 18, 1984, entered into by the parties to the Settlement Agreement with respect to the JM Included Action.

"Dismissals" means the Dismissals With Prejudice and the Dismissals Without Prejudice provided for in the Dismissal Agreement.

"Effective Date" means July 18, 1984.

"Final Order" means a judgment, order or other decree approved or entered by any State or Federal court (including, without limitation, this Court) located in one of the States, or the District of Columbia, which judgment, order or other decree has not been reversed or stayed and as to which the time to appeal has expired and as to which no appeal, petition for rehearing or petition for certiorari is pending (or if such appeal has been filed or any such petition has been granted, it has been finally decided and such judgment, order or other decree has not been reversed or stayed).

"JCP No. 1072" means Judicial Council Proceeding No. 1072, presently pending in the Superior Court of the State of California, County of San Francisco, which includes the JM Included Action.

"JM Debtors" means Johns-Manville Corporation and each of its Affiliates which filed a peti-

tion for reorganization under Chapter 11 of the Code with this Court on August 26, 1982, unless such corporation has had or will have a plan of reorganization confirmed by an order of this Court which is a Final Order prior to the Plan Confirmation Date.

"JM Employees" means present, former or future directors, officers and employees of one or more JM Insureds.

"JM Group" means the JM Insureds and the JM Employees.

"JM Included Action" means that portion of JCP No. 1072 represented by the allegations and claims of the JM Plaintiffs against the Settling Insurers and the allegations and claims of the Settling Insurers against the JM Plaintiffs.

"JM Insureds" means Manville Corporation, the JM Plaintiffs and each other Person (except natural persons) who was or is an Affiliate of Manville Corporation or Johns-Manville Corporation.

"JM Plaintiffs" means Johns-Manville Corporation, Johns-Manville Sales Corporation, Johns-Manville International Corporation, Johns-Manville Canada, Inc. (now known as JM Asbestos Inc.) and Johns-Manville Amiante Canada, Inc. (now known as JM Asbestos Inc.), each of which is a named plaintiff in JCP No. 1072.

"JM Releases" means the releases to be executed by Manville Corporation and each of the JM Plaintiffs on behalf of themselves and each other JM Insured and their respective successors and assigns, in substantially the form attached to the Settlement Agreement as Exhibit C.

"Lloyd's Syndicate" means (i) any syndicate of Lloyd's of London (including each member thereof

as such syndicate is presently or was previously constituted) which is or is alleged to be a subscribing insurer to one or more of the Policies listed on Exhibit A-3 to the Settlement Agreement and (ii) any syndicate or entity which is a party to the Settlement Agreement by reason of being a successor, assignee or otherwise of a Lloyd's Syndicate and which is so listed on the signature pages thereof.

"Payment Date" means the later of (i) December 31, 1985 and (ii) the fifth Business Day immediately following the Plan Confirmation Date, or such other later day as the parties may agree.

"Person" means an individual, a corporation, a partnership, an association, a trust or any other entity or organization, including, without limitation, any government or political subdivision or an agency or instrumentality thereof and any Person who presently has or in the future might have asbestos-related claims (including, without limitation, health, personal injury or property damage claims) against any or all members of the JM Group or against any or all members of the Settling Insurer Group.

"Plan" means the Joint Plan of Reorganization, dated October 17, 1983, of the JM Debtors, as filed with this Court on November 21, 1983, and as amended, modified or superseded from time to time, in the form in which it is confirmed by an order of this Court which is a Final Order.

"Plan Confirmation Date" means the date on which the Plan Confirmation Order becomes a Final Order.

"Plan Confirmation Order" means the order entered by this Court confirming the Plan.

"Policies" means the insurance policies listed in and the documents attached to the Settlement Agreement in Exhibits A-1, A-2 and A-3, in each case as may be addressed, modified, amended or supplemented; *provided, however*, that the term "Policies" does not and shall not include (i) that portion of, or the coverage provided under, any such policy or agreement issued by The Travelers Indemnity Company or any of its Affiliates providing workers' compensation or similar protection (a "Travelers WC Policy"), but only to the extent that such portion or coverage relates to claims which cannot be settled, compromised or otherwise resolved under applicable law or (ii) that portion of, or the coverage provided under, any Travelers WC Policy under which an award or other payment was being made as of the date of the Settlement Agreement.

"Policy Claims" means any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be, asserted by any Person against any or all members of the JM Group or against any or all members of the Settling Insurer Group based upon, arising out of or relating to any or all of the Policies.

"Settlement Agreement" means the Settlement Agreement dated as of July 18, 1984, between the Settling Insurer Parties, on the one hand, and Manville Corporation, et al., on the other hand.

"Settlement Amount" means, with respect to each Settling Insurer Party, an amount equal to (1) the sum of (a) the amount. set forth opposite its name on the signature pages to the Settlement Agreement *plus* (b) the sum of the amounts (calculated as set forth in the next sentence) for (i) initially, the one-year period (or portion thereof) commencing on January 1, 1986 and ending on December 31, 1986 or the Payment Date, whichever is earlier, and (ii) thereafter, for each one-year period (or portion thereof) commencing on the last day of the preceding one-year period and ending one year thereafter or on the Payment Date, whichever is earlier, minus (2) on a dollar-for-dollar basis, the aggregate amount of any payments made by such Settling Insurer Party during the period from and including the Effective Date to and including the Payment Date for which such Settling Insurer Party is entitled to indemnification pursuant to Paragraph 5 of the Settlement Agreement. The amounts referred to in clause (b) above shall be calculated as follows: (1) for the period referred to in subclause (i) above, the Applicable Rate per annum on the amount referred to in clause (a) above for the period from (and including) January 1, 1986 to (but excluding) the last day of such period and (2) for each succeeding period referred to in subclause (ii) above, the Applicable Rate per annum on the sum of the amount referred to in clause (a) above and each other amount calculated pursuant to this sentence for each prior period calculated pursuant to subclause (ii) for the period, from (and including) the first day of such

period to (but excluding) the last day of such period.

"Settlement Fund" means the aggregate of all Settlement Amounts deposited with (or in accordance with the written instructions of) the Clerk of this Court in accordance with the provisions of Paragraph 2 of the Settlement Agreement, and after such deposit all investment income thereon and gains or losses attributable thereto.

"Settling Insurer Group" means the Settling Insurers and their respective present or former Affiliates, and present, former or future directors, officers, stockholders (in their capacity as such), managing agents, members, members' agents, insurance underwriters and employees. The "Settling Insurer Group" of a Settling Insurer Party means the members of the Settling Insurer Party and their respective present or former Affiliates, and present, former or future directors, officers, stockholders (in their capacity as such), managing agents, members, members' agents, insurance underwriters and employees; *provided,* that, for purposes of this definition only, the Settling Insurer Party composed of Lloyd's Syndicates and British Companies shall also include all Lloyd's Syndicates and British Companies which are or are alleged to be subscribing insurers to one or more of the Policies listed on Exhibit A-3 to the Settlement Agreement.

"Settling Insurer Party" means any one of The Travelers Indemnity Company on behalf of itself and its Affiliates; The Home Insurance Company on behalf of itself and its Affiliates; the following Lloyd's Syndicates (including the underwriting

members thereof): 15, 16, 33, 48, 53, 56, 69, 90, 92, 108, 109, 112, 130, 131, 164, 204, 210, 211, 212, 219, 235, 250, 283, 297, 311, 316, 334, 347, 365, 373, 417, 422, 427, 431, 433, 440, 448, 458, 469, 472, 484, 490, 499, 507, 517, 555, 576, 581, 583, 604, 605, 620, 634, 637, 650, 652, 660, 665, 674, 677, 707, 755, 763, 768, 791, 800, 819, 845, 849, 884, 896, 917, 947, 964, 975, 989, 990 and 998; the following Lloyd's Syndicates (as such syndicate number was used at the time such syndicate allegedly subscribed to one or more of the Policies identified on Exhibit A-3 to the Settlement Agreement, and including the underwriting members thereof): 36, 57, 86, 88, 110, 151, 169, 174, 188, 194, 208, 214, 223, 233, 238, 274, 286, 300, 301, 315, 317, 371, 397, 405, 420, 425, 463, 470, 475, 476, 479, 531, 596, 598, 621, 629, 651, 656, 687, 688, 711, 713, 729, 748, 761, 767, 793, 795, 796, 797, 838, 851, 857, 867, 870, 900, 905 and 987; and the following British Companies: Andrew Weir Insurance Company Limited (as well as A. Weir, A. Weir Marine and Andrew Weir), British Aviation Insurance Company Limited (as well as BAIC), City General Insurance Company Limited (as well as City General), The Dominion Insurance Company Limited (as well as CF & AU, CF & AU Group H, Anglo-Saxon Insurance Association Limited, London & Edinburgh Insurance Company and Vanguard Insurance Company Limited), Eagle Star Insurance Company Limited (Aviation) (as well as Eagle Star, Eagle Star Aviation and Eagle Star Aviation A/C), English & American Insurance Company Limited (Non-Marine) (as well as E&A and E&A Non-Marine), English & American Insur-

ance Company Limited (Marine) (as well as E&A Marine and Economic), Excess Insurance Company Limited (as well as Excess and Excess A), The Lombard Elizabethan Insurance plc (as well as Lombard, Lombard Insurance Company Limited and Lombard Marine & General Insurance Company Limited), London Guaranty and Reinsurance Co. Limited (as well as Southern and Southern Insurance Company Limited), Orion Insurance Company plc (as well as Orion, Orion "T", Orion "T" A/C, Orion "T" A/C Aviation, Orion T Aviation A/C, Orion Group Aviation, Orion Group Aviation A/C, Orion Group Aviation Account, Orion/Drake/Sphere/New India Group Aviation A/C, Orion Drake Sphere New India Group Aviation A/C, Orion Drake Sphere Aviation, Orion "T" Marine A/C, Orion Non-Marine, Orion N/M, Orion N/M A/C, Orion (Non-Marine Account), Drake Insurance Company Limited, Sphere Insurance Company Limited, New India Assurance Company Limited and Orion Insurance Company Limited), Provincial Insurance plc (as well as Hull U/Rs Assen., Hull Uwrs. Assocn. A. Account, Hull Underwriters Association Limited, London Overseas A Account, London & Overseas Insurance Company Ltd. A Account and London & Overseas Insurance Company Limited), Prudential Assurance Company Limited (as well as Prudential and Prudential (City)), United Standard Insurance Company Limited (as well as United Standard), World Auxiliary Corporation Limited (as well as World Auxiliary, W. Aux. and W. Auxiliary).

"Subsidiary" of any Person means any corporation or other entity of which securities or voter

ownership interests having ordinary voting power to elect a majority of the board of directors or other persons performing similar functions is at the time owned directly or indirectly by such Person or one or more of its Subsidiaries or by such Person or one or more of its Subsidiaries.

Where the context so requires, each defined term stated in a singular form shall include the plural form, and each defined term stated in a plural form shall include the singular form.

23.2 *Orders.*

(A) The Settlement Agreement is, in all respects, approved, and the execution, delivery and performance of the Settlement Agreement and certain other documents referred to therein (including, without limitation, the Dismissal Agreement, the Dismissals and the JM Releases) by Manville Corporation on behalf of itself and its Affiliates and by each of the JM Plaintiffs are hereby ratified and confirmed, and such parties are hereby authorized to execute and deliver such additional documents and do such things as may be necessary to perform, implement and effectuate the Settlement Agreement and this Order;

(B) in accordance with Bankruptcy Rule 7067 and with the terms and conditions set forth in the Settlement Agreement, each Settling Insurer Party shall, on the Payment Date; (i) deposit with the Clerk of this Court (or pursuant to his written instructions as this Court, by subsequent order, may direct) its Settlement Amount in accordance with the provisions of Paragraph 2 of the Settlement Agreement, and (ii) within twenty

(20) days thereafter provide to this Court and Manville Corporation an explanation of the computation of said Settlement Amount, and the Clerk is authorized and directed to receive and deposit said Settlement Amounts in an interest-bearing account to be approved by this Court;

(C) the disposition of the Settlement Fund shall remain subject to the jurisdiction and further orders of, and proceedings in, this Court;

(D) any and all claims, charges or encumbrances which might otherwise have been assessable or assertable by any Person against or with respect to the JM Group's rights and interests based upon, arising out of or related to any or all of the Policies, and any and all claims or causes of action in law, equity, admiralty or otherwise based upon, arising out of, or related to any or all of the Policies or which were or are assessable or assertable by any Person against any or all of the Policies or any or all members of the Settling Insurer Group, are transferred, and shall attach, solely to the Settlement Fund;

(E) upon payment by each Settling Insurer Party of its Settlement Amount in accordance with the terms and provisions of the Settlement Agreement, each such Settling Insurer Party and its Settling Insurer Group (including, in the case of the Settling Insurer Group which includes Lloyd's Syndicates and British Companies, all Lloyd's Syndicates and British Companies which are or are alleged to be subscribing insurers to one or more of the Policies listed on Exhibit A-3 to the Settlement Agreement) shall have no further duties or obligations based upon, arising out

of or related to the Policies and shall thereafter be released from any and all Policy Claims by any Person, and all of the Policies of any or all members of such Settling Insurer Group shall upon such payment be exhausted by payment of such Settlement Amount and shall thereupon be null and void and of no further force or effect;

(F) upon deposit of the Settlement Amounts as set forth in Paragraph (B) above, all Persons are permanently restrained and enjoined from commencing and/or continuing any suit, arbitration or other proceeding of any type or nature for Policy Claims against any or all members of the Settling Insurer Group (it being understood that cross-claims which are unrelated to Policy Claims and which are asserted by any party to JCP No. 1072 against the Settling Insurer Parties are not so enjoined), except that no Person who asserted prior to the date this Order becomes a Final Order a claim or cause of action against any and all of the Settling Insurer Group seeking any and all damages (other than or in addition to policy proceeds) for bad faith or other insurer misconduct alleged in connection with the handling or disposition of claims is enjoined from proceeding only with respect to such claim or cause of action; *provided, however,* that any Person who (i) asserts such a claim or cause of action where the alleged act or acts or failure or failures to act upon which such claim or cause of action is based arose after the date of this Order and/or who (ii) asserts a claim or cause of action against the Settlement Fund or files a proof of claim for, or receives, a payment under the Plan,

is so restrained and enjoined from commencing or continuing any such action against any or all members of the Settling Insurer Group; and

(G) the dismissal, unconditionally and with prejudice, on the Payment Date of both: (i) the claims between the JM Plaintiffs, on the one hand, and the Settling Insurer Parties, on the other hand, asserted or assertable in the JM Included Action, and (ii) the JM Included Action itself, is hereby approved and authorized.

Dated: December 18, 1986
New York, New York

ENTER,

BURTON R. LIFLAND
United States Bankruptcy Judge

EXHIBIT A

Settlement Agreements		Settling Insurers
1.	Settlement Agreement dated as of November 22, 1985	The Aetna Casualty & Surety Company
2.	Settlement Agreement dated as of March 26, 1986	The Aetna Casualty & Surety Company
3.	Settlement Agreement dated as of October 7, 1986	AIU Insurance Company, Granite State Insurance Company, Lexington Insurance Company and National Union Fire Insurance Company of Pittsburgh, PA
4.	Settlement Agreement dated as of May 12, 1986	American Re-Insurance Company
5.	Settlement Agreement dated as of September 26, 1986	Centaur Insurance Company
6.	Settlement Agreement dated as of October 20, 1986	Commercial Union Insurance Company and The Northern Assurance Company of America
7.	Settlement Agreement dated as of October 21, 1986	First State Insurance Company

Settlement Agreements		Settling Insurers
8.	Settlement Agreement dated as of March 27, 1986	Gibraltar Casualty Company
9.	Settlement Agreement dated as of September 18, 1985	Highlands Insurance Company
10.	Settlement Agreement dated as of January 29, 1985	Insurance Company of North America, Midland Insurance Company and Allstate Insurance Company, as corporate successor of Northbrook Excess & Surplus Insurance Company (formerly known as "Northbrook Insurance Company")
11.	Settlement Agreement dated as of February 20, 1986	INSCO Ltd.
12.	Settlement Agreement dated as of October 20, 1986	International Surplus Lines Insurance Company
13.	Settlement Agreement dated as of September 8, 1986	[Settling insurers are set forth under the definition of "Settling Insurers" in paragraph 13.1 of this order]

Settlement Agreements	Settling Insurers
14. Settlement Agreement dated as of October 10, 1986	Marsh & McLennan, Incorporated and Marsh & McLennan, Limited
15. Settlement Agreement dated as of May 22, 1985	Peerless Casualty Company (now known as Peerless Insurance Company)
16. Settlement Agreement dated as of March 27, 1986	Prudential Reinsurance Company
17. Settlement Agreement dated as of May 28, 1986	Puritan Insurance Company
18. Settlement Agreement dated as of April 24, 1986	Reliance Insurance Company (on behalf of itself and as successor in interest to Standard Accident Insurance Company)
19. Settlement Agreement dated as of October 21, 1985	Rocky Mountain International Insurance Ltd.
20. Settlement Agreement dated as of October 10, 1986	Rocky Mountain International Insurance Ltd.
21. Settlement Agreement dated as of October 22, 1986	Royal Belge

Settlement Agreements	Settling Insurers
22. Settlement Agreement dated as of April 23, 1986	Sun Insurance Office, Limited, The London Assurance, and Sun Alliance Insurance Company
23. Settlement Agreement dated as of July 18, 1984	[Settling Insurers are set forth under the definition of "Settling Insurer Party" in paragraph 23.1 of this Order]

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In Proceedings for a Reorganization
Under Chapter 11

Case Nos. 82-B-11656
Through 82-B-11676

In re
JOHNS-MANVILLE CORPORATION, *et al.*,

Debtors.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

Leslie E. Orr, being duly sworn, says that she is over the age of 18 years and is employed by Davis Polk & Wardell, co-counsel to the debtors herein, and that on or before December 17, 1986 she caused to be served one true copy of the "ORDER WITH RESPECT TO INSURANCE SETTLEMENT AGREEMENTS" to the entities named on the attached list by hand delivery.

/s/ LESLIE E. ORR
Leslie E. Orr

Sworn to before me
on December 17, 1986

/s/ NANCY P. MARGOLIS
Notary Public

Nancy P. Margolis
Notary Public State of New York
No. 31-4876483
Qualified in New York County
[ILLEGIBLE]

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[LETTERHEAD OF ILLEGIBLE]

December 17, 1986

The Honorable Burton R. Lifland
United States Bankruptcy Court
for the Southern District
of New York
40 Foley Square
New York, New York 10007

Dear Judge Lifland:

Enclosed is a copy of the proposed order approving the insurance settlement agreements that were the subject of the final hearing on November 17. As I stated at the close of that hearing, this order is large, but uncomplicated. Each of the settlement agreements contained a section permitting the insurer to terminate the agreement if an order was not entered containing the provisions set forth in that paragraph. The provisions of each separate agreement were either identical or substantially similar, but they utilized definitions (set forth in each agreement) which were slightly different. Out of an excess of caution, therefore, the proposed order submitted herewith contains both the precise provisions that must be included in the approval order to prevent termination, together with the precise definitions that appear in each settlement agreement.

Respectfully submitted,

/s/ LOWELL GORDON HARRISS
Lowell Gordon Harriss

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In Proceedings For A Reorganization
Under Chapter 11
Case Nos. 82 B 11656 (BRL) Through
82 B 11676 (BRL) Inclusive

In re
JOHNS-MANVILLE CORPORATION, *et al.*,

Debtors.

ORDER SCHEDULING HEARING TO CONSIDER COMPROMISE AND SETTLEMENT OF INSURANCE LITIGATION

Upon the annexed application (the "Application") of Johns-Manville Corporation, debtor and debtor in possession, for and on behalf of itself and the other debtors and debtors in possession herein (collectively the "Debtors"), and upon this Court's "Order Fixing Service/Notice Requirements" dated April 5, 1983 as modified by this Court's "Order Supplementing Order Fixing Service/Notice Requirements to Conform with Bankruptcy Rules" dated October 4, 1983 (collectively the "Notice Orders"), and upon all the proceedings heretofore had herein, and

IT APPEARING from the Application that notice of the hearing (the "Fairness Hearing") to consider the proposed compromise and settlement of the claims asserted by the Debtors against The Travelers Indemnity Company, The Home Insurance Company, and various Lloyds of London syndicates (collectively the "Settling Carriers") and the counterclaims asserted by those Settling Carriers against the Debtors should be broader than the scope of notice and service requirements heretofore established by the Notice Orders for the compromise and settlement of controversies generally, and no adverse interest being represented, and after due deliberation and sufficient cause appearing therefor, it is

FOUND, that notice of the Fairness Hearing given as required by this order is reasonably calculated, under all the circumstances herein present, to apprise all entities who are interested or may have an interest in the proposed compromise and settlement described in the Application and to provide them with ample opportunity to appear and be heard at the Fairness Hearing, it is

NOW, on motion of LEVIN & WEINTRAUB & CRAMES and DAVIS POLK & WARDWELL, attorneys for the Debtors,

ORDERED, that the Fairness Hearing to consider the approval of the proposed compromise and settlement of the claims asserted by the Debtors against various of the Settling Carriers and the counterclaims asserted by those Settling Carriers against the Debtors, as more fully described in the annexed Application, will be

held before this Court in Courtroom 237 at the United States Courthouse, Foley Square, New York, New York on the 12th day of September, 1984 at 10:00 o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, and it is further

ORDERED, that the Debtors shall: (a) within ten (10) days after the date of the entry of this order send a "Notice of Hearing to Consider Compromise of Insurance Litigation" (the "Notice") substantially in the form of that annexed hereto as Exhibit "A", which Notice is approved in all respects, by first class regular mail to: (i) all members of the official committees heretofore appointed in the Debtors' chapter 11 cases and the respective counsel for such committees; (ii) the United States Trustee; (iii) the Securities & Exchange Commission; (iv) all persons who have filed notices of appearance pursuant to § 1109 of the Bankruptcy Code or have, in writing, requested that all notices be mailed to them in accordance with Bankruptcy Rule 2002(i); (v) all persons who have asserted "direct action" claims against the Debtors' insurance carriers, or their respective counsel; and (vi) all parties to the Judicial Council Proceeding No. 1072 presently pending in the Superior Court of the State of California, County of San Francisco, or their respective counsel; (b) within five (5) days after the date of the entry of this order send a copy of this order, the Application and exhibits appended thereto, and "Manville's Application For Approval Of Its Insurance Settlement Agreement With Travelers Indemnity Company, Home

Insurance Company And Certain Syndicates At Lloyd's, London" dated August 2, 1984 and the exhibits filed therewith, by personal service or express mail to all persons identified on Exhibit "C" appended to the Application; and (c) cause a copy of the Notice to be published once in the newspapers set forth on Exhibit "B" appended to the Application at least fifteen (15) days prior to the date of the Fairness Hearing, and it is further

ORDERED, that implementation of and compliance with this order and the notice requirements contained herein shall be deemed good and sufficient notice of the Fairness Hearing, and no further notice shall be required, and it is further

ORDERED, that the Debtors be, and they hereby are, authorized and empowered to take such steps and do such things as may be reasonably necessary to fulfill the requirements established by this order.

Dated: New York, New York
August 2, 1984

/s/ BURTON R. LIFLAND
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In Proceedings For A Reorganization
Under Chapter 11
Case Nos. 82 B 11656 (BRL) Through
82 B 11676 (BRL) Inclusive

In re
JOHNS-MANVILLE CORPORATION, *et al.*,

Debtors.

APPLICATION

TO THE HONORABLE BURTON R. LIFLAND,
UNITED STATES BANKRUPTCY JUDGE:

The application of Johns-Manville Corporation, for and on behalf of itself and the other debtors and debtors in possession herein (collectively the "Debtors"), by its attorneys, Levin & Weintraub & Crames and Davis Polk & Wardwell, respectfully represents:

1. On August 26, 1982, each of the Debtors filed a petition for reorganization under chapter 11, § 301 of the Bankruptcy Code (the "Code") and each was continued in the management and operation of its business and property as a debtor

in possession pursuant to §§ 1107 and 1108 of the Code. Such chapter 11 cases have been consolidated for procedural purposes and are being jointly administered. No trustee or examiner has been appointed herein.

2. The Debtors are engaged in diversified manufacturing, mining and forestry operations. At the time of the commencement of these chapter 11 cases, the Debtors had, among their various business activities, mined, processed, manufactured, and supplied asbestos and asbestos-containing products for many decades.

3. As this Court is aware, the Debtors, in March, 1980, instituted an action against various of its insurance carriers in the Superior Court of the State of California for the City and County of San Francisco seeking a definitive interpretation, by declaratory judgment, of the Debtors' insurance policies (i.e., the carriers' duty to provide coverage, to indemnify and to defend the Debtors) and seeking certain compensatory damages. Subsequently, and after the Debtors' insurers filed responsive pleadings to the Debtors' complaint and after preliminary discovery was taken, the aforesaid litigation was stayed in March, 1981 as a result of its coordination with three (3) other insurance coverage actions pending in the California courts. Eventually, they were "merged" into the Judicial Council Coordination Proceeding No. 1072 in the Superior Court of the State of California for the City and County of San Francisco (the "Insurance Litigation"). As the Court is further aware, a protracted procedural battle consumed almost a two-year period

after the coordination was effected concerning the appointment and attempted disqualification of the trial judge. Two judges eventually excused themselves and it was not until early 1983 following the appointment and unsuccessful attempt to disqualify the Honorable Ira A. Brown, Jr. that the stay of the Insurance Litigation was lifted.

4. The Insurance Litigation has been vigorously prosecuted and hotly contested by the Debtors and the twenty-seven (27) insurance carriers who are parties thereto. Discovery has been expansive and massive. Millions of documents have been produced by the Debtors and likewise a comparable number of documents produced by the insurance carriers have been reviewed by the Debtors. Extensive interrogatories and requests for admissions have been propounded. Approximately five hundred (500) depositions have been held. Suffice it to say that the Insurance Litigation constitutes a controversy of major proportions having serious and substantial ramifications, not only to the participating litigants but to the Debtors' estates, including all creditors, claimants and equity security holders.

5. On July 25, 1984, after approximately nine (9) months of intensive, arms-length settlement negotiations with teams of representatives from The Travelers Indemnity Company, The Home Insurance Company and various Lloyd's of London syndicates and British companies (collectively the "Settling Carriers"), an agreement for the compromise and settlement of the Insurance Litigation between the Debtors and the Settling

Carriers was executed (the "Insurance Settlement Agreement"). This provides, *inter alia*, for the payment by the Settling Carriers of approximately $315 million to the Debtors when an order confirming a plan of reorganization of the Debtors is final, with interest accruing after January 1, 1986. The Insurance Settlement Agreement further contemplates and in fact conditions its ultimate implementation upon the entry of a final order by this Court: (a) transferring and attaching to the aforesaid settlement fund of approximately $315 million any and all claims of all persons against the Debtors or the Settling Carriers against or with respect to the Debtors' rights and interests based upon, arising under or relating to any of the insurance policies identified and defined in the Insurance Settlement Agreement, and any and all claims or causes of action otherwise based upon, arising out of or related to any of the insurance policies which were or are assessable or assertable by any person against the insurance policies or the Settling Carriers; and (b) with some limited exceptions, permanently restraining and enjoining all persons from commencing or continuing any suit, arbitration or other proceeding of any type or nature for claims based upon, arising out of or relating to any of the insurance policies against any of the Settling Carriers and related persons.

6. Simultaneously herewith, the Debtors have filed with this Court "Manville's Application For Approval Of Its Insurance Settlement Agreement With Travelers Indemnity Company, Home Insurance Company And Certain Syndicates At

Lloyd's, London" dated August 2, 1984, which application is incorporated herein and deemed a part hereof. By this companion application, the Debtors seek to establish the notice and service procedures with respect to the Insurance Settlement Agreement and the hearing to be held by this Court to consider the fairness and approval thereof (the "Fairness Hearing"). There can be no doubt that the proposed compromise and settlement of the Insurance Litigation as it relates to the Settling Carriers represents a significant event in these chapter 11 cases and that the Insurance Settlement Agreement contemplates the resolution of substantial controversies. The magnitude of the proposed compromise and settlement and its effect upon the interested parties warrant comprehensive notice of the forthcoming Fairness Hearing.

7. By this Court's "Order Fixing Service/Notice Requirements" dated April 5, 1983, as modified by its "Order Supplementing Order Fixing Service/Notice Requirements to Conform with Bankruptcy Rules" dated October 4, 1983 (collectively the "Notice Orders"), procedures were established for the giving and service of notice for numerous types of applications. The Notice Orders provide that a hearing to approve the compromise or settlement of a controversy involving a dispute of $500,000 or more be held on twenty (20) days' notice and that such notice be given by mail to the United States Trustee, the Securities & Exchange Commission, all committees and their respective counsel, and all persons having filed notices of appearance pursuant

to § 1109 of the Code or having, in writing, requested notice in accordance with Bankruptcy Rule 2002(i).

8. Bankruptcy Rule 9019, applicable to the compromise of controversies, provides that the Court may approve a compromise or settlement after a hearing on notice to creditors as provided by Rule 2002(a) of the Bankruptcy Rules and to such other persons as the Court may designate. Bankruptcy Rule 2002(a)(3) contemplates that all creditors shall receive not less than twenty (20) days' notice by mail of a hearing on the approval of a compromise or settlement of a controversy, unless the Court for cause shown directs that notice not be sent.

9. By reason of the nature and significance of the Insurance Settlement Agreement, and without in any way suggesting any inadequacy in the service and notice requirements established by the Notice Orders, the Debtors believe it appropriate to provide a broader notice of the scheduled Fairness Hearing, not only by the mailing of notices to a larger number of "interested" parties but in addition by the publication of notice in the manner herein proposed.

10. Based upon recent events which have occurred in these chapter 11 cases and the previous disclosure of an impending resolution of the Insurance Litigation with the Settling Carriers, this Court designated September 7, 1984 at 10:00 o'clock as the date and time for a Fairness Hearing to consider approval of the Debtors' proposed compromise and settlement of the Insurance Litigation. Accordingly, it is the Debtors' desire to

not only satisfy the notice and service requirements provided in this Court's Notice Orders but to further provide broader notice, by mail and publication, sufficiently in advance of the scheduled September 7, 1984 Fairness Hearing so as to provide notice reasonably calculated, under all the circumstances herein present, to apprise all interested parties of the proposed Insurance Settlement Agreement and the Fairness Hearing and to afford them an opportunity to be heard.

11. The Debtors propose that notice of the Fairness Hearing, by regular mail, in the form of that annexed hereto as Exhibit "A" (the "Notice"), be given within ten (10) days after the entry of the annexed proposed order to: (i) all members of the official committees heretofore appointed in the Debtors' chapter 11 cases and the respective counsel for such committees; (ii) the United States Trustee; (iii) the Securities & Exchange Commission; (iv) all persons who have filed notices of appearance pursuant to § 1109 of the Bankruptcy Code or have, in writing, requested notices be mailed to them in accordance with Bankruptcy Rule 2002(i); (v) all persons who have asserted "direct action" claims against the Debtors' insurance carriers, or their respective counsel; and (vi) all parties to the Judicial Council Proceeding No. 1072 presently pending in the Superior Court of the State of California, County of San Francisco, or their respective counsel. In addition, it is proposed that within five (5) days of the date of the entry of the annexed proposed order the Debtors send a copy of the order, this application and the exhibits appended hereto,

and "Manville's Application For Approval Of Its Insurance Settlement Agreement With Travelers Indemnity Company, Home Insurance Company And Certain Syndicates At Lloyd's, London" dated August 2, 1984 and the exhibits filed therewith, by personal service or express mail, to all persons identified on Exhibit "C" annexed hereto.

12. The Debtors believe it is desirable to supplement the mailed notice so as to reach other interested parties whose names and addresses are unknown to the Debtors or with respect to whom notice by mail would be impracticable. The Debtors suggest that, pursuant to Bankruptcy Rule 2002(k), publication of the Notice be effected. Annexed hereto and marked as Exhibit "B" is a list of those newspapers wherein it is proposed that the Notice appear once, at least fifteen (15) days prior to the Fairness Hearing. This supplemental notice is warranted because of the "channeling" mechanism and injunctive relief required by the proposed Insurance Settlement Agreement and the effect thereof on those who might assert an interest in the insurance policies and the Debtors' claims against the Settling Carriers.

13. Accordingly the Debtors request that they be authorized to undertake and effect such notice and incur the expenditures necessary and contemplated in connection therewith.

WHEREFORE, the Debtors respectfully pray for the entry of the annexed order and for such other and further relief as the Court may deem just and proper.

Dated: New York, New York
August 2, 1984

JOHNS-MANVILLE CORPORATION
Debtor and Debtor in Possession
By its Attorneys

LEVIN & WEINTRAUB & CRAMES

By ILLEGIBLE

and

DAVIS POLK & WARDWELL

By ILLEGIBLE

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In Proceedings For A Reorganization
Under Chapter 11
Case Nos. 82 B 11656 (BRL) Through
82 B 11676 (BRL) Inclusive

In re
JOHNS-MANVILLE CORPORATION, *et al.*,

Debtors.

NOTICE OF HEARING TO CONSIDER APPROVAL OF COMPROMISE AND SETTLEMENT OF INSURANCE LITIGATION

TO: CREDITORS, CLAIMANTS, EQUITY SECURITY HOLDERS AND INTERESTED PARTIES:

PLEASE TAKE NOTICE that pursuant to order of the United States Bankruptcy Court dated August 2, 1984, a hearing pursuant to Rule 9019 of the Bankruptcy Rules will be held before the Honorable Burton R. Lifland, United States Bankruptcy Judge, in Courtroom 237 of the United States Courthouse, Foley Square, New York, New York on September 12, 1984 at 10:00

o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, to consider approval of a proposed compromise and settlement of various claims heretofore asserted by Johns-Manville Corporation, *et al*, debtors and debtors in possession (collectively the "Debtors"), against The Travelers Indemnity Company, The Home Insurance Company, and various Lloyds of London syndicates and British companies (collectively the "Settling Carriers") and various counterclaims heretofore asserted by them against the Debtors.

PLEASE TAKE FURTHER NOTICE that at said hearing, the Debtors will request the Court to approve and enter an order approving that certain Settlement Agreement dated as of July 18, 1984 (the "Settlement Agreement") by and among the Debtors and the Settling Carriers. The proposed compromise and settlement arises from an action instituted on March 31, 1980 by the Debtors against twenty-seven (27) of its insurance carriers in the Superior Court of the State of California for the City and County of San Francisco. *Johns-Manville Corporation, et al., vs. The Home Insurance Company, et al.*, Docket No. 765226 (hereinafter the "Action"). The complaint sought a definitive interpretation of the Debtors' insurance policies by requesting a declaratory judgment that: (a) each of the Debtors' insurers was under a duty to provide coverage and to indemnify and to reimburse the Debtors for all sums which they had paid or would become obligated to pay by reason of, among others, asbestos-related actions; and (b) each of the

Debtors' insurers was bound to provide coverage for asbestos-related injuries to the limits of liability for each year of its respective policies. Moreover, the complaint sought injunctive relief and damages for breach of contract, breach of covenants of good faith and fair dealing and violation of the California Insurance Code. On March 23, 1981, the Action was stayed by virtue of its coordination with three (3) other insurance coverage actions pending in the California courts (hereinafter collectively the "Insurance Litigation"). (The actions initially included with the Action in Judicial Council Coordination Proceeding No. 1072 were *Fireman's Fund Insurance Company vs. Fibreboard Corporation*, S.F.Sup. Ct. No. 753885; *GAF Corporation vs. Insurance Company of North America*, L.A.Sup. Ct. No. C286217; *Armstrong Cork Company vs. Aetna Casualty & Surety Company*, L.A.Sup. Ct. No. C315367. Two other actions, *Nicolet Inc. vs. Insurance Company of North America*, L.A.Sup. Ct. No. C398943, and *Johns-Manville Corporation v. Marsh & McLennan, Inc.*, S.F.Sup. Ct. No. 787776, were later added to the coordinated proceedings.) In early 1983 after a protracted procedural battle that ensued concerning the appointment and attempted disqualification of a trial judge and the eventual recusal of two judges, the stay of the coordinated proceedings was lifted. The proposed Insurance Settlement Agreement represents the compromise and settlement of the Debtors' claims against the Settling Carriers and the counterclaims asserted by the Settling Carriers against the Debtors. The Settling Carriers provided primary or excess

insurance to the Debtors for products liability, occupational diseases and general liability at various times during the period between 1947 and 1976. In particular, The Travelers Indemnity Company provided the Debtors with primary comprehensive general liability insurance from July 1, 1947 to July 1, 1976. In contrast thereto, both The Home Insurance Company and the various syndicates of Lloyds of London exclusively provided excess insurance coverage to the Debtors. Lloyds of London provided excess insurance coverage from May 7, 1951 to July 1, 1963 and Home Insurance Company provided excess insurance coverage from July 1, 1963 to July 1, 1976. During the course of the Insurance Litigation, the Settling Insurers have denied the Debtors' allegations and asserted various defenses, and have raised many substantial legal and factual issues involving, but not limited to, the "trigger" of coverage under the various policies of liability insurance, concealment, the insurance carriers' duty to defend and the appropriate choice of law.

The proposed Insurance Settlement Agreement provides as follows:

(a) The Debtors which are named as plaintiffs in the Insurance Litigation (the "JM Plaintiffs") and the Settling Carriers shall execute and deliver a "Dismissal Agreement" which provides for the "shut-down" of the Insurance Litigation *vis a vis* the Settling Carriers within five (5) days of execution (this has been done), the right of reinstitution upon the termination of the Insurance Settlement Agreement, the "freezing" and

preservation of discovery, and the execution and filing of "Dismissals Without Prejudice" in the Superior Court of the State of California, County of San Francisco (the "California Court") wherein the Insurance Litigation is pending (this too has been done).

(b) On the later of (i) December 31, 1985 or (ii) the fifth business day immediately following the date on which an order confirming a plan of reorganization of the Debtors becomes final (the "Payment Date"), the Settling Carriers will tender their respective settlement amounts, cross releases will be exchanged, and the Insurance Litigation will be dismissed with prejudice with respect to the settling parties.

(c) On the Payment Date (if after December 31, 1985), the Settling Carriers will deposit the aggregate settlement amount of $314,415,000, with accrued interest after January 1, 1986.

(d) An order of the Bankruptcy Court shall be obtained providing that any and all claims, charges or encumbrances which might otherwise have been assessable or assertable by any person against or with respect to the Debtors' rights and interests based upon, arising out of or related to any or all of the insurance policies identified and defined in the Insurance Settlement Agreement, and any and all claims or causes of action in law, equity, admiralty or otherwise based upon, arising out of or related to any or all of the insurance policies or which were or assessable or assertable by any person against any or all of the insurance policies or the Settling Carriers shall be trans-

ferred, and shall attach, solely to the settlement fund.

(e) An order of the Bankruptcy Court shall be obtained providing that all persons shall be restrained and enjoined from commencing and/or continuing any suit, arbitration or other proceeding of any type or nature for any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be asserted by any person against any and all of the Settling Carriers based upon, arising out of or relating to any or all of the insurance policies, except that no person who asserted prior to the effective date of such injunction a claim or cause of action against one or more of the Settling Carriers seeking damages (other than or in addition to policy proceeds) for bad faith or other insurers' misconduct alleged in connection with the handling or disposition of claims shall be enjoined from proceeding only with respect to such claim or cause of action; provided, however, that any person or entity who (a) asserts such a claim or cause of action where the alleged act or acts or failure or failures to act upon which such a claim or cause of action is based arose after the date of the order of the Bankruptcy Court approving the Insurance Settlement Agreement and/or who (b) asserts a claim or cause of action against the $314,415,000 settlement fund or files a proof of claim for, or receives, a payment under a plan of reorganization of the Debtors shall be restrained and enjoined from commencing or continuing any

such action against any and all of the Settling Carriers.

(f) The Debtors shall defend and indemnify the Settling Carriers from any and all liabilities, damages and expenses in connection with any and all claims or actions based upon, arising out of or related to the insurance policies, except (a) with respect to expenses incurred, or payments made, by the Settling Carriers prior to the "Effective Date" (as defined in the Insurance Settlement Agreement); (b) for attorneys' fees and other legal fees and expenses incurred by any of the Settling Carriers in any continuing aspect of the Insurance Litigation; and (c) for any liability or expense incurred by a Settling Insurer as a result of its having commenced a claim or proceeding for which the Debtors are entitled to indemnification pursuant to the Insurance Settlement Agreement. In the case of claims alleging bad faith or other insurer misconduct, the Debtors' indemnification obligation applies only to the extent that the alleged act or acts or failure or failures to act upon which the claims or actions for damages are based arose after the date of the entry of a final order approving the Insurance Settlement Agreement or where the claims or actions assert the breach of statutory, common or civil law or other obligations on the part of any of the Settling Carriers to settle claims where the Debtors controlled the handling of such claims and/or the decision to settle and for any reason refused, failed or declined to settle.

(g) The Settling Carriers shall defend and indemnify the Debtors for the amount of any judgment, settlement or setoff by a third party of any amount otherwise owing to the Debtors (i.e. a Settling Carrier's attempting to recover policy-related damages from another insurer) as a result of a claim or proceeding commenced by such Settling Carrier against any person (other than the Debtors) seeking damages (i) based on or measured by amounts paid by such Settling Carriers pursuant to the Insurance Settlement Agreement, (ii) based on, arising out of or related to the insurance policies or (iii) based on or arising out of attorneys' fees or other legal fees or expenses paid or incurred by Settling Carriers in connection with the Insurance Litigation.

(h) Each Settling Carrier shall irrevocably assign to the Debtors all rights of subrogation it may have in connection with the insurance policies.

(i) In the event the Debtors enter into a settlement agreement with any other of the insurance carriers in the Insurance Litigation with respect to the indemnification of such insurance company which is different from the indemnification contained in the Insurance Settlement Agreement, any of the Settling Carriers may elect to substitute or add those portions in place of, or in addition to, all or part of the indemnification provisions contained in the Insurance Settlement Agreement.

(j) The Debtors shall not provide in any plan of reorganization for the indemnification or holding harmless by any of the Debtors of any entity

except in the ordinary course of commercial and other business operations or of certain of the Debtors' employees.

(k) The Insurance Settlement Agreement will terminate automatically if (i) the relief described in subparagraphs "d" and "e" hereinabove are not obtained and contained in the order confirming a plan of reorganization of the Debtors, which order shall have become final, (ii) if the California Court wherein the Insurance Litigation is pending requires the Settling Carriers and the Debtors to continue their litigation or (iii) if the Insurance Settlement Agreement is not approved by the Bankruptcy Court.

PLEASE TAKE FURTHER NOTICE that the application of the Debtors in support of the proposed compromise and settlement, the proposed Insurance Settlement Agreement and the various exhibits relating thereto are on file and may be examined in the office of the Clerk of the Bankruptcy Court, Room 230, of the United States Courthouse, Foley Square, New York, New York by interested parties during regular Court hours.

PLEASE TAKE FURTHER NOTICE that objections, if any, to the relief sought by the Debtors shall be made in writing, shall state with particularity the grounds for the objection and shall be filed with the Bankruptcy Court and served upon Levin & Weintraub & Crames and Davis Polk & Wardwell, co-counsel for the Debtors, and any other persons whose interests would be affected if the objections were to be sustained, on or before September 1, 1984.

PLEASE TAKE FURTHER NOTICE that the hearing scheduled herein may be adjourned from time to time without further notice to creditors or other parties in interest other than by an announcement of such adjournment in Court on the date scheduled herein for said hearing.

Dated: New York, New York
August 2, 1984

BY ORDER OF THE UNITED STATES
BANKRUPTCY COURT

HONORABLE BURTON R. LIFLAND
United States Bankruptcy Judge
United States Courthouse
Foley Square
New York, NY 10007

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LARGEST CIRCULATION NEWSPAPER BY STATE

State	Largest Newspaper	Circulation (000)
Alabama	Birmingham Post Herald/News	223.5
Alaska	Anchorage Times	46.7
Arizona	Phoenix Republic, Gazette	379.3
Arkansas	Little Rock Arkansas Gazette	125.4
California	Sacramento Bee	219.1
	San Diego Union	340.2
	Los Angeles Times	1,038.5
	San Francisco Exam/ Chron.	680.1
Colorado	Denver Rocky Mountain News	315.5
Connecticut	Hartford Courant	218.4
Delaware	Wilmington News, Journal	126.2
District of Columbia	Washington Post	788.5
Florida	Orlando Sentinel	213.4
	Miami Herald News	467.5
	Tampa Tribune	197.0

State	Largest Newspaper	Circulation (000)
Georgia	Atlanta Journal Constitution	403.5
Hawaii	Honolulu Star Bulletin, Advert	193.4
Idaho	Boise The Idaho Statesman	57.5
Illinois	Chicago Tribune	751.0
Indiana	Indianapolis Star News	364.5
Iowa	Des Moines Register Tribune	239.3
Kansas	Wichita Eagle-Beacon	120.9
Kentucky	Louisville Courier—Journal Times	317.0
Louisiana	New Orleans TMS-PIC/ Sta-item	276.3
Maine	Portland Express, Press Herald	90.5
Maryland	Baltimore Sun	348.9
Massachusetts	Boston Globe	514.8
Michigan	Detroit News	630.7
	Grand Rapids Press	132.7
Minnesota	Minneapolis Star and Tribune	361.7
Mississippi	Jackson Clarion—Ledger News	109.4

State	Largest Newspaper	Circulation (000)
Missouri	Kansas City Star Times	517.7
	St. Louis Post Disp.	240.4
Montana	Billings Gazette	62.1
Nebraska	Omaha World - Herald	223.1
Nevada	Las Vegas Review—Journal	99.8
New Hampshire	Manchester Union Leader, News	68.3
New Jersey	Newark—The Star-Ledger	432.1
New Mexico	Albuquerque Journal, Tribune	136.1
New York	Albany Times Union Knick News	125.3
	New York News	1,305.5
	Buffalo News	318.7
North Carolina	Charlotte Observer, News	219.5
	Raleigh News & Observer	163.9
North Dakota	Fargo/Moorhead Forum	56.1
Ohio	Columbus Dispatch	328.8
	Cleveland Plain Dealer	493.3
	Cincinnati Enquire	189.8
Oklahoma	Oklahoma City Oklahoman, Times	280.0

State	Largest Newspaper	Circulation (000)
Oregon	Portland Oregonian, Oregon Journal	289.6
Pennsylvania	Harrisburg Pat. News	105.5
	Philadelphia Inquirer, News	533.1
	Pittsburgh Press, Post Gazette	427.4
	Scranton Times	53.1
Rhode Island	Providence Bulletin, Journal	217.7
South Carolina	Columbia State, Record	137.7
	Greenville News Piedmont	109.9
South Dakota	Sioux Falls Argus Leader	43.0
Tennessee	Nashville Tennessean/ Banner	123.0
	Memphis Commercial Appeal, Prs-Scim	272.8
Texas	San Antonio Exp. News	168.9
	Houston Chronicle	459.2
	Dallas News	317.3
Utah	Salt Lake Tribune, Deseret News	179.2
Vermont	Burlington Free Press	51.4

State	Largest Newspaper	Circulation (000)
Virginia	Norfolk VA Pilot/ Ledger Star	227.0
	Richmond News-Leader, Times-Disp.	247.7
Washington	Seattle Times/Post Int.	417.3
West Virginia	Charleston Gazette, Mail	109.6
Wisconsin	Milwaukee Journal, Sentinel	485.2
Wyoming	Casper Star-Tribune	38.1

SUPPLEMENTARY LIST OF LARGEST CIRCULATION NEWSPAPERS IN UNITED STATES

Paper	Circulation (000)
Wall Street Journal (National Edition)	2,020.1
USA Today	1,300.0
New York Times	910.5
New York Post	962.1
Chicago Sun Times	639.1
Detriot Free Press	635.1
Long Island Newsday	525.2
Houston Post	401.9
Los Angeles Herald Examiner	254.9
Denver Post	243.4
Dallas Times Herald	243.5
Orange County Register	291.7
St. Petersburg Times/Independent	278.8
New York Law Journal	

LARGEST CIRCULATION CANADIAN NEWSPAPERS IN MAJOR METROPOLITAN AREAS

	Largest Newspaper	Circulation (000)
Montreal	Gazette (Eng.)	197.1
	La Presse (Fr.)	179.8
Ottawa	Citizen (Eng.)	180.2
	La Droit (Fr.)	40.4
Toronto	Star	497.9
Calgary	Herald	145.1

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 06-2103-bk, 06-2118-bk, 06-2186-bk

Filed May 25, 2010

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 24th day of May, two thousand ten.

IN RE JOHNS-MANVILLE CORPORATION, DEBTOR.

JOHNS-MANVILLE CORPORATION, MANVILLE CORPORATION, MANVILLE INTERNATIONAL CORPORATION, MANVILLE EXPORT CORPORATION, JOHNS-MANVILLE INTERNATIONAL CORPORATION, MANVILLE SALES CORPORATION f/k/a JOHNS-MANVILLE SALES CORPORATION, successor by merger to MANVILLE BUILDINGS MATERIALS CORPORATION, MANVILLE PRODUCTS CORPORATION AND MANVILLE SERVICE CORPORATION, MANVILLE

INTERNATIONAL CANADA, INC., MANVILLE CANADA, INC., MANVILLE INVESTMENT CORPORATION, MANVILLE PROPERTIES CORPORATION, ALLAN-DEANE CORPORATION, KEN-CARYL RANCH CORPORATION, JOHNS-MANVILLE IDAHO INC., MANVILLE CANADA SERVICE INC., and SUNBELT CONTRACTORS INC.,

Debtors,

Travelers Casualty and Surety Company, Travelers Property Casualty Corp., Travelers Indemnity Company, Common Law Settlement Counsel, Statutory Settlement Counsel, and HAWAII SETTLEMENT COUNSEL,

Movants-Appellees,

—v.—

Chubb Indemnity Insurance Company, Asbestos Personal Injury Plaintiffs, Cascino Asbestos Claimants, Pearlie Bailey, Shirley Melvin, General Lee Cole, Robert Alvin Griffin, Vernon Warnell, and LEE FLETCHER ANTHONY,

Objectors-Appellants.

The Travelers Indemnity Company, Travelers Casualty and Surety Company and Travelers Property Casualty Corp. having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel

rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

[SEAL]

/s/ CATHERINE O'HAGAN WOLFE

§ 524. Effect of discharge

(a) A discharge in a case under this title—

(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived;

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived; and

(3) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect or recover from, or offset against, property of the debtor of the kind specified in section 541(a)(2) of this title that is acquired after the commencement of the case, on account of any allowable community claim, except a community claim that is excepted from discharge under section 523, 1228(a)(1), or 1328(a)(1), or that would be so excepted, determined in accordance with the provisions of sections 523(c) and 523(d) of this title, in a case concerning the debtor's spouse commenced on the date of the filing of the petition in the case concerning the debtor, whether or not discharge of the debt based on such community claim is waived.

(b) Subsection (a)(3) of this section does not apply if—

(1)(A) the debtor's spouse is a debtor in a case under this title, or a bankrupt or a debtor in a case under the Bankruptcy Act, commenced within six years of the date of the filing of the petition in the case concerning the debtor; and

(B) the court does not grant the debtor's spouse a discharge in such case concerning the debtor's spouse; or

(2)(A) the court would not grant the debtor's spouse a discharge in a case under chapter 7 of this title concerning such spouse commenced on the date of the filing of the petition in the case concerning the debtor; and

(B) a determination that the court would not so grant such discharge is made by the bankruptcy court within the time and in the manner provided for a determination under section 727 of this title of whether a debtor is granted a discharge.

(c) An agreement between a holder of a claim and the debtor, the consideration for which, in whole or in part, is based on a debt that is dischargeable in a case under this title is enforceable only to any extent enforceable under applicable nonbankruptcy law, whether or not discharge of such debt is waived, only if—

(1) such agreement was made before the granting of the discharge under section 727, 1141, 1228, or 1328 of this title;

(2) the debtor received the disclosures described in subsection (k) at or before the time at which the debtor signed the agreement;

(3) such agreement has been filed with the court and, if applicable, accompanied by a declaration or an affidavit of the attorney that represented the debtor during the course of negotiating an agreement under this subsection, which states that—

(A) such agreement represents a fully informed and voluntary agreement by the debtor;

(B) such agreement does not impose an undue hardship on the debtor or a dependent of the debtor; and

(C) the attorney fully advised the debtor of the legal effect and consequences of—

(i) an agreement of the kind specified in this subsection; and

(ii) any default under such an agreement;

(4) the debtor has not rescinded such agreement at any time prior to discharge or within sixty days after such agreement is filed with the court, whichever occurs later, by giving notice of rescission to the holder of such claim;

(5) the provisions of subsection (d) of this section have been complied with; and

(6)(A) in a case concerning an individual who was not represented by an attorney during the course of negotiating an agreement under this subsection, the court approves such agreement as—

(i) not imposing an undue hardship on the debtor or a dependent of the debtor; and

(ii) in the best interest of the debtor.

(B) Subparagraph (A) shall not apply to the extent that such debt is a consumer debt secured by real property.

(d) In a case concerning an individual, when the court has determined whether to grant or not to grant a discharge under section 727, 1141, 1228, or 1328 of this title, the court may hold a hearing at which the debtor shall appear in person. At any such hearing, the court shall inform the debtor that a discharge has been granted or the reason why a discharge has not been granted. If a discharge has been granted and if the debtor desires to make an agreement of the kind specified in subsection (c) of this section and was not represented by an attorney during the course of negotiating such agreement, then the court shall hold a hearing at which the debtor shall appear in person and at such hearing the court shall—

(1) inform the debtor—

(A) that such an agreement is not required under this title, under nonbankruptcy law, or under any agreement

not made in accordance with the provisions of subsection (c) of this section; and

(B) of the legal effect and consequences of—

(i) an agreement of the kind specified in subsection (c) of this section; and

(ii) a default under such an agreement; and

(2) determine whether the agreement that the debtor desires to make complies with the requirements of subsection (c)(6) of this section, if the consideration for such agreement is based in whole or in part on a consumer debt that is not secured by real property of the debtor.

(c) Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.

(f) Nothing contained in subsection (c) or (d) of this section prevents a debtor from voluntarily repaying any debt.

(g)(1)(A) After notice and hearing, a court that enters an order confirming a plan of reorganization under chapter 11 may issue, in connection with such order, an injunction in accordance with this subsection to supplement the injunctive effect of a discharge under this section.

(B) An injunction may be issued under subparagraph (A) to enjoin entities from taking legal action for the purpose of directly or indirectly

collecting, recovering, or receiving payment or recovery with respect to any claim or demand that, under a plan of reorganization, is to be paid in whole or in part by a trust described in paragraph (2)(B)(i), except such legal actions as are expressly allowed by the injunction, the confirmation order, or the plan of reorganization.

(2)(A) Subject to subsection (h), if the requirements of subparagraph (B) are met at the time an injunction described in paragraph (1) is entered, then after entry of such injunction, any proceeding that involves the validity, application, construction, or modification of such injunction, or of this subsection with respect to such injunction, may be commenced only in the district court in which such injunction was entered, and such court shall have exclusive jurisdiction over any such proceeding without regard to the amount in controversy.

(B) The requirements of this subparagraph are that—

> **(i)** the injunction is to be implemented in connection with a trust that, pursuant to the plan of reorganization—
>
> > **(I)** is to assume the liabilities of a debtor which at the time of entry of the order for relief has been named as a defendant in personal injury, wrongful death, or property-damage actions seeking recovery for damages allegedly caused by the presence of, or exposure to, asbestos or asbestos-containing products;

(II) is to be funded in whole or in part by the securities of 1 or more debtors involved in such plan and by the obligation of such debtor or debtors to make future payments, including dividends;

(III) is to own, or by the exercise of rights granted under such plan would be entitled to own if specified contingencies occur, a majority of the voting shares of—

(aa) each such debtor;

(bb) the parent corporation of each such debtor; or

(cc) a subsidiary of each such debtor that is also a debtor; and

(IV) is to use its assets or income to pay claims and demands; and

(ii) subject to subsection (h), the court determines that—

(I) the debtor is likely to be subject to substantial future demands for payment arising out of the same or similar conduct or events that gave rise to the claims that are addressed by the injunction;

(II) the actual amounts, numbers, and timing of such future demands cannot be determined;

(III) pursuit of such demands outside the procedures prescribed by such plan is likely to threaten the plan's purpose to

deal equitably with claims and future demands;

(IV) as part of the process of seeking confirmation of such plan—

(aa) the terms of the injunction proposed to be issued under paragraph (1)(A), including any provisions barring actions against third parties pursuant to paragraph (4)(A), are set out in such plan and in any disclosure statement supporting the plan; and

(bb) a separate class or classes of the claimants whose claims are to be addressed by a trust described in clause (i) is established and votes, by at least 75 percent of those voting, in favor of the plan; and

(V) subject to subsection (h), pursuant to court orders or otherwise, the trust will operate through mechanisms such as structured, periodic, or supplemental payments, pro rata distributions, matrices, or periodic review of estimates of the numbers and values of present claims and future demands, or other comparable mechanisms, that provide reasonable assurance that the trust will value, and be in a financial position to pay, present claims and future demands that involve similar claims in substantially the same manner.

(3)(A) If the requirements of paragraph (2)(B) are met and the order confirming the plan of reorganization was issued or affirmed by the district court that has jurisdiction over the reorganization case, then after the time for appeal of the order that issues or affirms the plan—

(i) the injunction shall be valid and enforceable and may not be revoked or modified by any court except through appeal in accordance with paragraph (6);

(ii) no entity that pursuant to such plan or thereafter becomes a direct or indirect transferee of, or successor to any assets of, a debtor or trust that is the subject of the injunction shall be liable with respect to any claim or demand made against such entity by reason of its becoming such a transferee or successor; and

(iii) no entity that pursuant to such plan or thereafter makes a loan to such a debtor or trust or to such a successor or transferee shall, by reason of making the loan, be liable with respect to any claim or demand made against such entity, nor shall any pledge of assets made in connection with such a loan be upset or impaired for that reason;

(B) Subparagraph (A) shall not be construed to—

(i) imply that an entity described in subparagraph (A)(ii) or (iii) would, if this paragraph were not applicable, necessarily be liable to any entity by reason of any of the acts described in subparagraph (A);

(ii) relieve any such entity of the duty to comply with, or of liability under, any Federal or State law regarding the making of a fraudulent conveyance in a transaction described in subparagraph (A)(ii) or (iii); or

(iii) relieve a debtor of the debtor's obligation to comply with the terms of the plan of reorganization, or affect the power of the court to exercise its authority under sections 1141 and 1142 to compel the debtor to do so.

(4)(A)(i) Subject to subparagraph (B), an injunction described in paragraph (1) shall be valid and enforceable against all entities that it addresses.

(ii) Notwithstanding the provisions of section 524(e), such an injunction may bar any action directed against a third party who is identifiable from the terms of such injunction (by name or as part of an identifiable group) and is alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor to the extent such alleged liability of such third party arises by reason of—

(I) the third party's ownership of a financial interest in the debtor, a past or present affiliate of the debtor, or a predecessor in interest of the debtor;

(II) the third party's involvement in the management of the debtor or a predecessor in interest of the debtor, or service as an officer, director or employee of the debtor or a related party;

(III) the third party's provision of insurance to the debtor or a related party; or

(IV) the third party's involvement in a transaction changing the corporate structure, or in a loan or other financial transaction affecting the financial condition, of the debtor or a related party, including but not limited to—

(aa) involvement in providing financing (debt or equity), or advice to an entity involved in such a transaction; or

(bb) acquiring or selling a financial interest in an entity as part of such a transaction.

(iii) As used in this subparagraph, the term "related party" means—

(I) a past or present affiliate of the debtor;

(II) a predecessor in interest of the debtor; or

(III) any entity that owned a financial interest in—

(aa) the debtor;

(bb) a past or present affiliate of the debtor; or

(cc) a predecessor in interest of the debtor.

(B) Subject to subsection (h), if, under a plan of reorganization, a kind of demand described in such plan is to be paid in whole or in part by a trust described in paragraph (2)(B)(i) in connection with which an injunction described in paragraph (1) is to be implemented, then such

injunction shall be valid and enforceable with respect to a demand of such kind made, after such plan is confirmed, against the debtor or debtors involved, or against a third party described in subparagraph (A)(ii), if—

(i) as part of the proceedings leading to issuance of such injunction, the court appoints a legal representative for the purpose of protecting the rights of persons that might subsequently assert demands of such kind, and

(ii) the court determines, before entering the order confirming such plan, that identifying such debtor or debtors, or such third party (by name or as part of an identifiable group), in such injunction with respect to such demands for purposes of this subparagraph is fair and equitable with respect to the persons that might subsequently assert such demands, in light of the benefits provided, or to be provided, to such trust on behalf of such debtor or debtors or such third party.

(5) In this subsection, the term "demand" means a demand for payment, present or future, that—

(A) was not a claim during the proceedings leading to the confirmation of a plan of reorganization;

(B) arises out of the same or similar conduct or events that gave rise to the claims addressed by the injunction issued under paragraph (1); and

(C) pursuant to the plan, is to be paid by a trust described in paragraph (2)(B)(i).

(6) Paragraph (3)(A)(i) does not bar an action taken by or at the direction of an appellate court on appeal of an injunction issued under paragraph (1) or of the order of confirmation that relates to the injunction.

(7) This subsection does not affect the operation of section 1144 or the power of the district court to refer a proceeding under section 157 of title 28 or any reference of a proceeding made prior to the date of the enactment of this subsection.

(h) Application to existing injunctions.—For purposes of subsection (g)—

(1) subject to paragraph (2), if an injunction of the kind described in subsection (g)(1)(B) was issued before the date of the enactment of this Act, as part of a plan of reorganization confirmed by an order entered before such date, then the injunction shall be considered to meet the requirements of subsection (g)(2)(B) for purposes of subsection (g)(2)(A), and to satisfy subsection (g)(4)(A)(ii), if—

(A) the court determined at the time the plan was confirmed that the plan was fair and equitable in accordance with the requirements of section 1129(b);

(B) as part of the proceedings leading to issuance of such injunction and confirmation of such plan, the court had appointed a legal representative for the purpose of protecting the rights of per-

sons that might subsequently assert demands described in subsection (g)(4)(B) with respect to such plan; and

(C) such legal representative did not object to confirmation of such plan or issuance of such injunction; and

(2) for purposes of paragraph (1), if a trust described in subsection (g)(2)(B)(i) is subject to a court order on the date of the enactment of this Act staying such trust from settling or paying further claims—

(A) the requirements of subsection (g)(2)(B)(ii)(V) shall not apply with respect to such trust until such stay is lifted or dissolved; and

(B) if such trust meets such requirements on the date such stay is lifted or dissolved, such trust shall be considered to have met such requirements continuously from the date of the enactment of this Act.

(i) The willful failure of a creditor to credit payments received under a plan confirmed under this title, unless the order confirming the plan is revoked, the plan is in default, or the creditor has not received payments required to be made under the plan in the manner required by the plan (including crediting the amounts required under the plan), shall constitute a violation of an injunction under subsection (a)(2) if the act of the creditor to collect and failure to credit payments in the manner required by the plan caused material injury to the debtor.

(j) Subsection (a)(2) does not operate as an injunction against an act by a creditor that is the holder of a secured claim, if—

(1) such creditor retains a security interest in real property that is the principal residence of the debtor;

(2) such act is in the ordinary course of business between the creditor and the debtor; and

(3) such act is limited to seeking or obtaining periodic payments associated with a valid security interest in lieu of pursuit of in rem relief to enforce the lien.

(k)(1) The disclosures required under subsection (c)(2) shall consist of the disclosure statement described in paragraph (3), completed as required in that paragraph, together with the agreement specified in subsection (c), statement, declaration, motion and order described, respectively, in paragraphs (4) through (8), and shall be the only disclosures required in connection with entering into such agreement.

(2) Disclosures made under paragraph (1) shall be made clearly and conspicuously and in writing. The terms "Amount Reaffirmed" and "Annual Percentage Rate" shall be disclosed more conspicuously than other terms, data or information provided in connection with this disclosure, except that the phrases "Before agreeing to reaffirm a debt, review these important disclosures" and "Summary of Reaffirmation Agreement" may be equally conspicuous. Disclosures may be made in a different order and may use terminology dif-

ferent from that set forth in paragraphs (2) through (8), except that the terms "Amount Reaffirmed" and "Annual Percentage Rate" must be used where indicated.

(3) The disclosure statement required under this paragraph shall consist of the following:

(A) The statement: "Part A: Before agreeing to reaffirm a debt, review these important disclosures:";

(B) Under the heading "Summary of Reaffirmation Agreement", the statement: "This Summary is made pursuant to the requirements of the Bankruptcy Code";

(C) The "Amount Reaffirmed", using that term, which shall be—

(i) the total amount of debt that the debtor agrees to reaffirm by entering into an agreement of the kind specified in subsection (c), and

(ii) the total of any fees and costs accrued as of the date of the disclosure statement, related to such total amount.

(D) In conjunction with the disclosure of the "Amount Reaffirmed", the statements—

(i) "The amount of debt you have agreed to reaffirm"; and

(ii) "Your credit agreement may obligate you to pay additional amounts which may come due after the date of this disclosure. Consult your credit agreement."

(E) The "Annual Percentage Rate", using that term, which shall be disclosed as—

(i) if, at the time the petition is filed, the debt is an extension of credit under an open end credit plan, as the terms "credit" and "open end credit plan" are defined in section 103 of the Truth in Lending Act, then—

(I) the annual percentage rate determined under paragraphs (5) and (6) of section 127(b) of the Truth in Lending Act, as applicable, as disclosed to the debtor in the most recent periodic statement prior to entering into an agreement of the kind specified in subsection (c) or, if no such periodic statement has been given to the debtor during the prior 6 months, the annual percentage rate as it would have been so disclosed at the time the disclosure statement is given to the debtor, or to the extent this annual percentage rate is not readily available or not applicable, then

(II) the simple interest rate applicable to the amount reaffirmed as of the date the disclosure statement is given to the debtor, or if different simple interest rates apply to different balances, the simple interest rate applicable to each such balance, identifying the amount of each such bal-

ance included in the amount reaffirmed, or

(III) if the entity making the disclosure elects, to disclose the annual percentage rate under subclause (I) and the simple interest rate under subclause (II); or

(ii) if, at the time the petition is filed, the debt is an extension of credit other than under an open end credit plan, as the terms "credit" and "open end credit plan" are defined in section 103 of the Truth in Lending Act, then—

(I) the annual percentage rate under section 128(a)(4) of the Truth in Lending Act, as disclosed to the debtor in the most recent disclosure statement given to the debtor prior to the entering into an agreement of the kind specified in subsection (c) with respect to the debt, or, if no such disclosure statement was given to the debtor, the annual percentage rate as it would have been so disclosed at the time the disclosure statement is given to the debtor, or to the extent this annual percentage rate is not readily available or not applicable, then

(II) the simple interest rate applicable to the amount reaffirmed as of the date the disclosure statement is given to the debtor, or if different

simple interest rates apply to different balances, the simple interest rate applicable to each such balance, identifying the amount of such balance included in the amount reaffirmed, or

(III) if the entity making the disclosure elects, to disclose the annual percentage rate under (I) and the simple interest rate under (II).

(F) If the underlying debt transaction was disclosed as a variable rate transaction on the most recent disclosure given under the Truth in Lending Act, by stating "The interest rate on your loan may be a variable interest rate which changes from time to time, so that the annual percentage rate disclosed here may be higher or lower."

(G) If the debt is secured by a security interest which has not been waived in whole or in part or determined to be void by a final order of the court at the time of the disclosure, by disclosing that a security interest or lien in goods or property is asserted over some or all of the debts the debtor is reaffirming and listing the items and their original purchase price that are subject to the asserted security interest, or if not a purchase-money security interest then listing by items or types and the original amount of the loan.

(H) At the election of the creditor, a statement of the repayment schedule using 1 or a combination of the following—

(i) by making the statement: "Your first payment in the amount of $____ is due on ____ but the future payment amount may be different. Consult your reaffirmation agreement or credit agreement, as applicable.", and stating the amount of the first payment and the due date of that payment in the places provided;

(ii) by making the statement: "Your payment schedule will be:", and describing the repayment schedule with the number, amount, and due dates or period of payments scheduled to repay the debts reaffirmed to the extent then known by the disclosing party; or

(iii) by describing the debtor's repayment obligations with reasonable specificity to the extent then known by the disclosing party.

(I) The following statement: "Note: When this disclosure refers to what a creditor 'may' do, it does not use the word 'may' to give the creditor specific permission. The word 'may' is used to tell you what might occur if the law permits the creditor to take the action. If you have questions about your reaffirming a debt or what the law requires, consult with the attorney who helped you negotiate this agreement reaffirming a debt. If you don't have an attorney helping you, the judge will explain the effect of your reaffirming a debt when the hearing on the reaffirmation agreement is held."

(J)(i) The following additional statements:

"Reaffirming a debt is a serious financial decision. The law requires you to take certain steps to make sure the decision is in your best interest.

If these steps are not completed, the reaffirmation agreement is not effective, even though you have signed it.

"1. Read the disclosures in this Part A carefully. Consider the decision to reaffirm carefully. Then, if you want to reaffirm, sign the reaffirmation agreement in Part B (or you may use a separate agreement you and your creditor agree on).

"2. Complete and sign Part D and be sure you can afford to make the payments you are agreeing to make and have received a copy of the disclosure statement and a completed and signed reaffirmation agreement.

"3. If you were represented by an attorney during the negotiation of your reaffirmation agreement, the attorney must have signed the certification in Part C.

"4. If you were not represented by an attorney during the negotiation of your reaffirmation agreement, you must have completed and signed Part E.

"5. The original of this disclosure must be filed with the court by you or your creditor. If a separate reaffirmation agreement (other than the one in Part B) has been signed, it must be attached.

"6. If you were represented by an attorney during the negotiation of your reaffirmation agreement, your reaffirmation agreement becomes effective upon filing with the court

unless the reaffirmation is presumed to be an undue hardship as explained in Part D.

"7. If you were not represented by an attorney during the negotiation of your reaffirmation agreement, it will not be effective unless the court approves it. The court will notify you of the hearing on your reaffirmation agreement. You must attend this hearing in bankruptcy court where the judge will review your reaffirmation agreement. The bankruptcy court must approve your reaffirmation agreement as consistent with your best interests, except that no court approval is required if your reaffirmation agreement is for a consumer debt secured by a mortgage, deed of trust, security deed, or other lien on your real property, like your home.

"Your right to rescind (cancel) your reaffirmation agreement. You may rescind (cancel) your reaffirmation agreement at any time before the bankruptcy court enters a discharge order, or before the expiration of the 60-day period that begins on the date your reaffirmation agreement is filed with the court, whichever occurs later. To rescind (cancel) your reaffirmation agreement, you must notify the creditor that your reaffirmation agreement is rescinded (or canceled).

"What are your obligations if you reaffirm the debt? A reaffirmed debt remains your personal legal obligation. It is not discharged in your bankruptcy case. That means that if you default on your reaffirmed debt after your bankruptcy case is over, your creditor may be able to take your property or your wages. Otherwise, your

obligations will be determined by the reaffirmation agreement which may have changed the terms of the original agreement. For example, if you are reaffirming an open end credit agreement, the creditor may be permitted by that agreement or applicable law to change the terms of that agreement in the future under certain conditions.

"Are you required to enter into a reaffirmation agreement by any law? No, you are not required to reaffirm a debt by any law. Only agree to reaffirm a debt if it is in your best interest. Be sure you can afford the payments you agree to make.

"What if your creditor has a security interest or lien? Your bankruptcy discharge does not eliminate any lien on your property. A 'lien' is often referred to as a security interest, deed of trust, mortgage or security deed. Even if you do not reaffirm and your personal liability on the debt is discharged, because of the lien your creditor may still have the right to take the security property if you do not pay the debt or default on it. If the lien is on an item of personal property that is exempt under your State's law or that the trustee has abandoned, you may be able to redeem the item rather than reaffirm the debt. To redeem, you make a single payment to the creditor equal to the current value of the security property, as agreed by the parties or determined by the court."

(ii) In the case of a reaffirmation under subsection (m)(2), numbered paragraph 6 in the disclosures required by clause (i) of this subparagraph shall read as follows:

"6. If you were represented by an attorney during the negotiation of your reaffirmation agreement, your reaffirmation agreement becomes effective upon filing with the court."

(4) The form of such agreement required under this paragraph shall consist of the following:

"Part B: Reaffirmation Agreement. I (we) agree to reaffirm the debts arising under the credit agreement described below.

"Brief description of credit agreement:

"Description of any changes to the credit agreement made as part of this reaffirmation agreement:

"Signature: Date:

"Borrower:

"Co-borrower, if also reaffirming these debts:

"Accepted by creditor:

"Date of creditor acceptance:".

(5) The declaration shall consist of the following:

(A) The following certification:

"Part C: Certification by Debtor's Attorney (If Any).

"I hereby certify that (1) this agreement represents a fully informed and voluntary agreement by the debtor; (2) this agreement does not impose an undue hardship on the debtor or any dependent of the debtor; and (3) I have fully advised the debtor of the legal effect and consequences of

this agreement and any default under this agreement.

"Signature of Debtor's Attorney: Date:".

(B) If a presumption of undue hardship has been established with respect to such agreement, such certification shall state that in the opinion of the attorney, the debtor is able to make the payment.

(C) In the case of a reaffirmation agreement under subsection (m)(2), subparagraph (B) is not applicable.

(6)(A) The statement in support of such agreement, which the debtor shall sign and date prior to filing with the court, shall consist of the following:

"Part D: Debtor's Statement in Support of Reaffirmation Agreement.

"1. I believe this reaffirmation agreement will not impose an undue hardship on my dependents or me. I can afford to make the payments on the reaffirmed debt because my monthly income (take home pay plus any other income received) is $____, and my actual current monthly expenses including monthly payments on post-bankruptcy debt and other reaffirmation agreements total $____, leaving $____ to make the required payments on this reaffirmed debt. I understand that if my income less my monthly expenses does not leave enough to make the payments, this reaffirmation agreement is presumed to be an undue hardship on me and must be reviewed by the court. However, this presumption may be over-

come if I explain to the satisfaction of the court how I can afford to make the payments here: ____.

"2. I received a copy of the Reaffirmation Disclosure Statement in Part A and a completed and signed reaffirmation agreement."

(B) Where the debtor is represented by an attorney and is reaffirming a debt owed to a creditor defined in section 19(b)(1)(A)(iv) of the Federal Reserve Act, the statement of support of the reaffirmation agreement, which the debtor shall sign and date prior to filing with the court, shall consist of the following:

"I believe this reaffirmation agreement is in my financial interest. I can afford to make the payments on the reaffirmed debt. I received a copy of the Reaffirmation Disclosure Statement in Part A and a completed and signed reaffirmation agreement."

(7) The motion that may be used if approval of such agreement by the court is required in order for it to be effective, shall be signed and dated by the movant and shall consist of the following:

"Part E: Motion for Court Approval (To be completed only if the debtor is not represented by an attorney.). I (we), the debtor(s), affirm the following to be true and correct:

"I am not represented by an attorney in connection with this reaffirmation agreement.

"I believe this reaffirmation agreement is in my best interest based on the income and expenses I have disclosed in my Statement in Support of this reaffirmation agreement, and because (pro-

vide any additional relevant reasons the court should consider):

"Therefore, I ask the court for an order approving this reaffirmation agreement."

(8) The court order, which may be used to approve such agreement, shall consist of the following:

"Court Order: The court grants the debtor's motion and approves the reaffirmation agreement described above."

(l) Notwithstanding any other provision of this title the following shall apply:

> **(1)** A creditor may accept payments from a debtor before and after the filing of an agreement of the kind specified in subsection (c) with the court.
>
> **(2)** A creditor may accept payments from a debtor under such agreement that the creditor believes in good faith to be effective.
>
> **(3)** The requirements of subsections (c)(2) and (k) shall be satisfied if disclosures required under those subsections are given in good faith.

(m)(1) Until 60 days after an agreement of the kind specified in subsection (c) is filed with the court (or such additional period as the court, after notice and a hearing and for cause, orders before the expiration of such period), it shall be presumed that such agreement is an undue hardship on the debtor if the debtor's monthly income less the debtor's monthly expenses as shown on

the debtor's completed and signed statement in support of such agreement required under subsection (k)(6)(A) is less than the scheduled payments on the reaffirmed debt. This presumption shall be reviewed by the court. The presumption may be rebutted in writing by the debtor if the statement includes an explanation that identifies additional sources of funds to make the payments as agreed upon under the terms of such agreement. If the presumption is not rebutted to the satisfaction of the court, the court may disapprove such agreement. No agreement shall be disapproved without notice and a hearing to the debtor and creditor, and such hearing shall be concluded before the entry of the debtor's discharge.

(2) This subsection does not apply to reaffirmation agreements where the creditor is a credit union, as defined in section 19(b)(1)(A)(iv) of the Federal Reserve Act.

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Petitioners,

v.

CHUBB INDEMNITY INSURANCE COMPANY, *et al.*,
Respondents.

IN RE THE TRAVELERS INDEMNITY COMPANY, *et al.*,
Petitioners.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit and On Petition for a Writ of Mandumus

BRIEF IN OPPOSITION FOR RESPONDENT CHUBB INDEMNITY INSURANCE COMPANY

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RULE 29.6 DISCLOSURE

Chubb Indemnity Insurance Company ("Chubb") is a wholly-owned subsidiary of Federal Insurance Company, which in turn is a wholly owned subsidiary of The Chubb Corporation, which is publicly held. No publicly held company otherwise directly or indirectly owns 10% or more of Chubb Indemnity Insurance Company.

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BRIEF IN OPPOSITION FOR RESPONDENT CHUBB INDEMNITY INSURANCE COMPANY

INTRODUCTION

There is no reason for this Court to revisit what two Justices referred to at prior argument as this "mysterious" case. Travelers' breathless predictions of the demise of orderly bankruptcy proceedings are baseless. The sky is not falling, and there is no threat to Section 524(g) bankruptcy trusts. The Second Circuit's rulings have nothing to do with the disposition of estate assets, the discharge of debtors,

or the ability to bind future asbestos claimants, through virtual representation, to a reorganization plan that cuts off claims against insurers that are derivative of a debtor's own liabilities. The Second Circuit instead applied "bedrock concepts of due process of law" that did "not break any new ground relating to the constitutional requirements of an *in rem* bankruptcy proceeding" to vindicate Chubb's due process rights to adequate notice and representation when the bankruptcy court purportedly undertook in 1986 to cut off Chubb's independent, potential future claims against Travelers. (App. 4a, 49a).

Travelers' assertion that the Second Circuit disregarded this Court's mandate is unfounded. Chubb's properly-preserved due process challenge is the precise issue that this Court invited the Second Circuit to "take up" on remand. When it did so, the Second Circuit determined, in the words of *Bailey*, that Chubb "was not given constitutionally sufficient notice of the 1986 Orders," nor was it adequately represented at the proceedings, "so that due process absolves it from following them, whatever their scope." The Second Circuit did revisit its prior jurisdictional holding, but that court's reaffirmation of its prior jurisdictional determination did not arise in the context condemned by this Court, i.e., entertaining an improper collateral attack on a final order by participants in the prior proceeding. Instead, the Second Circuit's analysis was undertaken in the distinct context of considering Chubb's due process objections—specifically, to evaluate the district court's ruling, and Travelers' argument, that the *in rem* nature of bankruptcy court proceedings excused compliance with otherwise applicable, "bedrock," due process requirements of adequate notice and representation. In this context, the Second Circuit's juris-

dictional holding was wholly appropriate, and in no sense violated this Court's mandate.

Additionally, there is no cause for review here because the Second Circuit correctly sustained Chubb's due process argument in light of Travelers' concession that the "Direct Action" claims were "unimaginable" in the 1980s, and because no attempt was made then to provide virtual representation to Chubb. Moreover, the Second Circuit's conclusion is buttressed by the facts that (1) the 1984 published notices were never intended to be directed toward Chubb; (2) the Bankruptcy Court's September 26, 1985 Order confirmed that Manville and Travelers were not seeking an injunction that would have affected Chubb's rights; and (3) no subsequent effort was made to give Chubb notice in 1986 that the Bankruptcy Court nevertheless intended to enter an injunction affecting Chubb's rights.

Travelers' arguments, moreover, would require the Court to review, through a most inappropriate vehicle, issues of bankruptcy and constitutional law that have vexed courts and scholars for decades, i.e. the existence and extent of a bankruptcy court's power to provide non-consensual releases of third party claims against non-debtors. As the Court will recall from the briefs of the parties and the *amici* in *Bailey*, there is a circuit split of authority as to when, if ever, a bankruptcy court may enter an order providing for the non-consensual release of one non-debtor's claim against another (although no circuit has approved the release of claims against non-debtors that were not derivative of the liability of the debtor itself). Whatever division of authority may exist regarding the propriety of third-party releases is not implicated by this case, however, since no court

has even suggested that such a release may be enforced against a party who did not receive constitutionally adequate notice. Because the Second Circuit's decision was a routine application of settled due process law on the issue of notice, and concerns a bankruptcy court's release of concededly non-derivative, third-party claims against a non-debtor, both the substance and posture of this case make it a particularly poor vehicle for this Court to attempt to address the permissible limits of non-debtor releases in bankruptcy.

Finally, *certiorari* is inappropriate because review of Travelers' alleged points of error would be precluded by Chubb's independent, alternative challenge to the bankruptcy court's attempted exercise of subject matter jurisdiction over Chubb in 2004. Specifically, the bankruptcy court's remnant subject matter jurisdiction to enforce its 1986 Orders extended only to alleged violators of its 1986 Orders. Because Travelers never claimed that Chubb had attempted to violate those orders, the bankruptcy court had no jurisdiction in 2004 to hale Chubb before that court, much less to enter an order purporting to approve what amounted to a mandatory class-action settlement and "clarify" or otherwise affect Chubb's rights as a condition of that settlement.

The petitions should be denied.

STATEMENT OF THE CASE

I. MAY-AUGUST 1984–THE TRAVELERS SETTLEMENT AND NOTICE PROGRAM, AND APPOINTMENT OF THE FUTURE CLAIMANTS' REPRESENTATIVE

Johns-Manville Corporation ("Manville") filed for bankruptcy protection in 1982 in the face of an over-

whelming number of asbestos claims, while simultaneously embroiled in protracted insurance coverage litigation with its insurers, including Travelers Indemnity Co. ("Travelers"). On May 25, 1984, Manville announced that it had tentatively settled with Travelers and a settlement agreement was executed in July. (SA-34-35).[1] On August 2, 1984, Manville submitted an Application seeking approval of its insurance settlement agreement with Travelers and several other insurers. (SA-1-37). Effective August 1, 1984, the bankruptcy court appointed a Future Claimants' Representative ("FCR") to provide virtual representation for future asbestos personal injury claimants against Manville. (App. 10a).

Manville's August 2, 1984 settlement-approval Application represented that the requested injunction pertained solely to claims seeking to reach property of Manville's estate. (SA-9). Manville likewise requested leave to publish notice of the proposed settlement because the contemplated "'channeling' mechanism and injunctive relief" would affect the rights of "those who might assert *an interest in the insurance policies and the Debtors' claims against the Settling Carriers.*" (SA-58) (emphasis added). Manville never provided notice that it intended to enjoin independent claims of third persons against Travelers or suggested any intention to direct notice to such persons.

The August 2, 1984 Notice of Hearing was addressed solely to *Manville's* "CREDITORS, CLAIMANTS, EQUITY SECURITY HOLDERS AND INTERESTED PARTIES," giving notice of "a hearing pursuant to Rule

---

[1] References to "A-__" and "SA-__" are to the Appendix and Supplemental Appendix filed in the Second Circuit.

9019 of the Bankruptcy Rules . . . to consider approval of a proposed compromise and settlement of various claims heretofore asserted by Johns-Manville Corporation . . . against Travelers Indemnity Company . . . and various counterclaims heretofore asserted by them against the Debtors." (SA-38). Chubb never insured Manville, and was not a Manville creditor, claimant, or equity security holder or a party in interest in Manville's bankruptcy case. Moreover, the notice was not addressed to persons holding claims against Travelers unrelated to the *res* of the estate.

II. SEPTEMBER 1984-JUNE 1985–JURISDICTIONAL OBJECTIONS TO THE PROPOSED INSURANCE INJUNCTION AND THE JUNE 3, 1985 LETTER AGREEMENT AMENDING THE SETTLEMENT AGREEMENT TO RESOLVE THOSE OBJECTIONS

Beginning in September 1984, two creditors' committees repeatedly raised jurisdictional objections to the Settlement Agreement, arguing that the proposed injunction against the pursuit of "Policy Claims," defined as "any and all claims . . . against [Travelers] based upon, arising out of or relating to the Policies," exceeded the bankruptcy court's subject matter jurisdiction because "the release and injunction sought by Manville would affect even those claims held by persons who have no current or potential claim against Manville." (SA-97; *see also* A-578-79, SA-99, SA-127, SA-139, SA-160, SA-185-86). Manville, on the other hand, repeatedly insisted that "Manville seeks only to release the Settling Insurers from the rights Manville might itself have had against them or rights derivative of Manville's rights

under the policies being compromised and settled." (A-1025; *see also* A-1021-22, A-1089; A-1104).

Ultimately, Travelers and Manville executed the June 3, 1985 letter agreement "clarif[ying] the intent of the parties" and amending the Settlement Agreement and its exhibits—including the proposed channeling injunction—to the extent necessary to ensure that the scope of the injunction remained within the bounds of the bankruptcy court's *in rem* jurisdiction. (SA-424). Specifically, they agreed that "[t]he channeling order is intended only to channel claims against the *res* to the Settlement Fund and *the injunction is intended only to restrain claims against the res (i.e., the Policies) which are or may be asserted against the Settling Insurers.*" (SA-422, 426) (emphasis added).

III. SEPTEMBER 1985-PROVISIONAL APPROVAL OF THE TRAVELERS SETTLEMENT, INCORPORATING THE JUNE 3, 1985 LETTER AGREEMENT

Contrary to Travelers' statements both here (Cert. Pet. at 21) and in *Bailey* (Reply Br. at 6, n.1), the June 3, 1985 letter was no "private" agreement, nor mere "correspondence" among the parties. Indeed, it was in reliance upon this agreement that the objectors withdrew their objections and the bankruptcy court ruled that it had the power to approve the settlement—facts that the Second Circuit, on remand, found highly relevant in evaluating Chubb's due process challenge. Following execution of the June 3 letter, Manville sought an interim order declaring that the bankruptcy court had power to approve the settlement and reserving for the future a hearing on the economic sufficiency of the proposed settlement.

At a September 26, 1985 hearing on Manville's application, the FCR's counsel emphasized that the letter agreement was an exhibit to the proposed Order and "obviously" was to be an "integral part" of the order. (SA-209-10). The bankruptcy court expressly adopted the FCR's recitals:

> [The FCR's counsel has summarized] the comprehension or understanding of all parties that were involved in the . . . elimination of the presentation to the Court as to certain legal issues which are resolved by this Order . . . and the Court agrees, and to the extent this record is necessary to express the Court's agreement in that regard I do express it. And under these circumstances and based upon the formality of the withdrawal of the objections . . . I am prepared to sign the Order."

(SA-214-15).

The bankruptcy court's order recited that the June 3, 1985 letter agreements "confirm[ed] the intent of the parties with respect to various provisions of the Settlement Agreement . . . ." (SA-220-22). Relying upon Travelers' representations, the court determined that it "has the power and the authority to approve the Settlement Agreement . . . together with Exhibits B and C . . . [and] has the power and authority to enter the orders required thereby." The court then approved the Travelers settlement "subject only to the result of a [future] hearing at which the court will consider . . . as a factual matter, whether the amounts paid in settlement fall within the range of reasonableness . . . ." (*Id.*).

Therefore, as of September 26, 1985: (1) Manville and Travelers had amended their settlement agree-

ment and proposed injunction to provide that "the injunction is intended only to restrain claims against the *res* (*i.e.*, the Policies)," resolving the jurisdictional objections; (2) to formalize this understanding, the bankruptcy court incorporated the June 3 letter as an "integral" part of its provisional approval order; and (3) the only issue remaining for consideration was the adequacy of the proposed settlement amount.

IV. OCTOBER-DECEMBER 1986–APPROVAL OF THE SETTLEMENT AGREEMENT AND CONFIRMATION OF THE REORGANIZATION PLAN

Over a year later, the bankruptcy court issued a "Notice of Hearing to Consider Approval of Compromise and Settlement of Certain Insurance Litigation" "to resume consideration of the . . . 'Original Settlement Agreement'" with Travelers. (SA-562-63). There was no suggestion that the prior understandings incorporated in the September 26, 1985 order would not be honored or would be altered. To the contrary, the order scheduling the hearing referenced "the minutes taken before me at the hearings held pursuant to the August 2, 1984 Order . . . , and upon all the proceedings heretofore had herein[.]" (SA-571).

In December 1986, the bankruptcy court issued two orders (the "1986 Orders"). The Insurance Settlement Order (containing the Insurance Injunction) granted final approval of the Travelers settlement and enjoined all persons from suing Travelers for "Policy Claims," which again were defined as "any and all claims . . . which have been, or could have been, or might be asserted by any Person against [Travelers] based upon, arising out of or relating to the Policies" issued by Travelers. The Confirmation

Order (containing the main Channeling Injunction) barred all current and future claimants from asserting claims against Manville and other protected parties (including Travelers) that arise from or are derivative of Manville's own liabilities and channeled such claims to the Manville Trust for consideration and payment.

The Insurance Injunction channeled "Policy Claims," to the insurance "Settlement Fund," which, in turn, was deposited into the Manville Trust pursuant to the Confirmation Order. Policy Claims subject to the Insurance Injunction thus were channeled to the Manville Trust for consideration and payment. Significantly, however, no provisions were made for the Manville Trust to address or pay compensation for independent tort claims against Travelers that neither seek to recover under the Policies nor to recover indirectly for claims against Manville.

The Second Circuit affirmed the order confirming the Manville plan. *See Kane* v. *Johns-Manville Corp.*, 843 F.2d 636 (2d Cir. 1988). Separately, it upheld the validity of the injunction barring the assertion of Policy Claims against Manville's insurers against a challenge by MacArthur Corporation, a Manville asbestos distributor, which claimed to be a co-insured under the settled insurance policies. Construing the injunction as barring claims that "seek to collect out of the proceeds of Manville's insurance policies on the basis of Manville's conduct," the court held that the bankruptcy court's established power to preserve the *res* and adjudicate competing claims to the *res*—including the insurance policies and settlement proceeds—extended to enjoining claims that sought to recover out of the policy proceeds. *MacArthur Co.* v. *Johns-Manville Corp.*, 837 F.2d 89, 92-93 (2d Cir.

1988) (App. 287a). The court further rejected MacArthur's due process complaint that it was entitled to receive notice before the insurance settlements had been negotiated, ruling that due process was satisfied by providing MacArthur with notice and a hearing prior to the settlements' approval. (App. 291-92a).

V. THE 2002 ENFORCEMENT PROCEEDINGS

In 2001, asbestos claimants started suing Travelers and other insurers, including Chubb, in so-called "Direct Actions," either under state consumer protection statutes or under certain state common law theories, alleging liability for wrongdoing independent of any tortious conduct by Manville. In 2002, Travelers asked the bankruptcy court to enjoin these actions as prohibited "Policy Claims" under the 1986 Orders because, Travelers alleged, virtually all of its knowledge of the hazards of asbestos came from its insurance relationship with Manville. Without ruling on the motion, the bankruptcy court issued a temporary restraining order and directed the parties to mediate.

VI. THE 2004 SETTLEMENTS AND THE "CLARIFYING" ORDER

In 2004, the mediation resulted in three settlements. Travelers agreed to pay nearly $500 million to the claimants and their counsel to settle lawsuits that it claimed were already barred by the 1986 Injunctions. But Travelers insisted on tying its settlements to a mechanism for cutting off any further Direct Action claims against it and any potential indemnity or contribution claims from its insurer co-defendants in the Direct Actions. Therefore, in addition to enjoining present claimants then

before the court—all of whom had already agreed to dismiss their pending suits and release their claims—the "clarifying" order Travelers sought pursuant to the Common Law Direct Action settlement would bar all *future* Direct Actions by parties not before the court. (A-817). The Direct Action claimants and their counsel, formerly the respondents to Travelers' enforcement motions, agreed to withdraw their contention that the 1986 Orders did not bar the Direct Actions and to cooperate with Travelers to obtain an order purporting to bar future Direct Actions, and related indemnity and contribution claims, by absent and future claimants.

Before June 2004, the bankruptcy court did not purport to exercise its remnant enforcement jurisdiction over anyone other than those plaintiffs and their counsel who were actually alleged to be violating the 1986 injunctions. That changed when Travelers filed motions to approve the settlement agreements. Court-approved notices of the proposed settlement and approval hearing were published and mailed to individuals who previously had submitted asbestos bodily injury claims against the Manville Trust (but not to any of Travelers' co-defendants in the Direct Actions such as Chubb). The notices were only intended to apprise people who "filed or resolved an asbestos-related personal injury or wrongful-death claim or may do so in the future," that their "rights to file claims against Travelers Property Casualty Company and affiliated Travelers entities may be affected if a settlement is approved by the Court." (A-887-94).

Chubb never insured Manville, and had not previously been a party to any proceedings in the Manville bankruptcy. But as a co-defendant with

Travelers in certain Common-Law Direct Actions, Chubb would be enjoined under the proposed Common-Law Direct Action settlement from bringing potential contribution and indemnity claims against Travelers in the event Chubb were held liable on claims for which Travelers shared liability. Chubb accordingly filed a limited objection to the proposed Common-Law Direct Action settlement urging that the Bankruptcy Court had no jurisdiction or discretion to undertake to affect any of Chubb's rights, and that to the extent the 1986 injunctions purported to do so already, they were unenforceable as against Chubb.

On August 17, 2004, the bankruptcy court overruled all objections, approved the settlements, and entered the "clarifying" order. The bankruptcy court reasoned that "the evidence . . . establishes that the direct action claims against Travelers are inextricably intertwined with Travelers['] long relationship as Manville's insurer." (App. 258a). Relying on that premise, the bankruptcy court "clarifie[d]" that all present and future Direct Actions "are—and always have been—permanently barred" by the 1986 injunctions. (App. 259a). The bankruptcy court further held that all contribution or indemnity claims against Travelers in connection with the Direct Actions were likewise barred. (App. 267-68a). The bankruptcy court further declared that all future claims "against Travelers that directly or indirectly are based upon, arise out of or relate to Travelers['] insurance relationship with Manville or Travelers['] knowledge or alleged knowledge concerning the hazards of asbestos" were barred. (App. 273a).

The bankruptcy court never addressed Chubb's due process objection. The court instead ruled that Chubb's objections had been rendered "moot" by a

limited judgment reduction provision that had been added to the Clarifying Order.

VII. THE APPEALS AND THE *BAILEY* DECISION

The district court largely affirmed the bankruptcy court's order, but vacated a "gatekeeping" provision requiring any plaintiff wishing to bring a suit against Travelers in state court "arising out of any policy of insurance provided by Travelers to a policyholder other than Manville" first to seek leave from the bankruptcy court. (App. 156a-160a). That court rejected Chubb's due process argument because Chubb was a "sophisticated insurer with asbestos-related insurance policies," and therefore the bankruptcy court's August 2, 1984 Notice "should have put Chubb . . . on notice with regards to whatever asbestos-related claims it may have against Travelers and the other settling insurers." The district court further relied upon the Second Circuit's 1988 rejection of MacArthur's unrelated due process challenge to the Travelers settlement. (App. 163-64a).

Additionally, the district court rejected Chubb's argument that Chubb was in the position of an unrepresented future claimant in the 1980s that could not receive constitutionally adequate notice concerning claims that, as Travelers' conceded (A-1217), were "unimaginable" in the 1980s. The district court reasoned that, "[u]nlike the class action settlements in *Amchem* and *Ortiz*," which involved exercises of *in personam* jurisdiction over asbestos manufacturers, "the injunction here is based on the Bankruptcy Court's *in rem* power over the Manville estate." (App. 164a). The district court therefore concluded that the supposedly *in rem* nature of the prior proceedings created "an exception to the due process concerns

raised by Chubb" because the bankruptcy code creates "'a special remedial scheme'" that allows for the foreclosure of "'successive litigation by nonlitigants.'" (*Id.* (quoting *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 846 (1999))).

In 2008, the Second Circuit vacated the bankruptcy court's order. The Second Circuit believed that the bankruptcy court's 2004 order improperly expanded the scope of the 1986 Injunctions by interpreting the term "Policy Claims" to include Direct Actions against Travelers that did not seek to hold Travelers liable for Manville's conduct or recover against the proceeds of the insurance policies or settlement that constituted property of Manville's estate. Accordingly, the Second Circuit ruled that "while there is no doubt that the bankruptcy court had jurisdiction to clarify its prior orders, that clarification cannot be used as a predicate to enjoin claims over which it had no jurisdiction." (App. 106-07a). The Second Circuit noted, but did not address, Chubb's independent due process argument. (App. 105-06a n.17).

This Court granted *certiorari*, and reversed by a 7-2 majority in *Bailey*, 129 S. Ct. 2195. The Court rejected the Second Circuit's conclusion that the 2004 "Clarifying Order" impermissibly expanded the scope of the 1986 Orders. Instead, this Court found that, whether or not permissible, the definition of "Policy Claims" in the 1986 Insurance Settlement Order in fact unambiguously barred even non-derivative claims against Travelers. The Court therefore concluded that, even if the bankruptcy court exceeded its jurisdiction in 1986, the Second Circuit had impermissibly countenanced a collateral attack on a final order in violation of principles of *res judicata* to the extent that the challenge was raised by parties to

the 1986 proceedings or those in privity with them who "were given a fair chance to challenge the Bankruptcy Court's subject-matter jurisdiction." (App. 72a).

The Court emphasized that its "holding is narrow. We do not resolve whether a bankruptcy court, in 1986 or today, could properly enjoin claims against nondebtor insurers that are not derivative of the debtor's wrongdoing." (App. 74a). Further, the Court emphasized that it was not decid[ing] whether any particular respondent is bound by the 1986 Orders," and noted Chubb's position "that it was not given constitutionally sufficient notice of the 1986 Orders, so that due process absolves it from following them, whatever their scope," and authorized the Second Circuit, on remand, to "take up this objection and any others that respondents have preserved." (App. 75a).

VIII. THE SECOND CIRCUIT'S 2010 OPINION

Following remand, the Second Circuit addressed Chubb's due process argument and declared, "In our view, Chubb is correct." (App. 4a). Applying "bedrock concepts of due process of law," the court opined that "both the bankruptcy court and the district court erred in rejecting Chubb's due process argument" and "conclude[d] that Chubb was not afforded constitutionally sufficient notice of the proceedings that led to the entry of the 1986 orders by the bankruptcy court. As such, Chubb is not bound by the bankruptcy court's 2004 interpretation of those orders" as it would "offend fundamental notions of due process to bind Chubb to [those] Orders." (App. 4-5a, 30a).

The Second Circuit rejected the bankruptcy court's blanket conclusion that any claims by Travelers'

Direct Action insurer co-defendants were barred by the Insurance Injunction as "put[ting] the proverbial cart before the horse by assuming that Chubb was bound by the 1986 Orders." (App. 31a). The court further rejected the bankruptcy court's ruling that a judgment reduction provision inserted in the Clarifying Order rendered Chubb's due process argument "moot." (*Id.*).

The court then addressed the district court's analysis of Chubb's due process argument. First, the court held that *MacArthur's* holding regarding the adequacy of notice was not *res judicata* as to Chubb because Chubb was neither a party to the 1986 proceedings nor in privity with any party thereto. (App. 33-34a). Further, the court held that the discretionary "law of the case" doctrine was inapplicable because the due process claim rejected in *MacArthur*, involving an alleged coinsured asserting Manville-derived claims who received actual notice of the settlement approval proceedings "and was well aware of its interest in the matter," was "readily distinguishable" from Chubb's claim that it received no notice at all of the settlement approval proceedings that purported to cut off non-Manville derived contribution and indemnity claims against Travelers that were "unimaginable" in 1986. (App. 34-35a).

Next, the Second Circuit addressed the district court's conclusion that bankruptcy's "special remedial scheme" created an "exception to the due process concerns raised by Chubb." (App. 35a). The court observed that the special powers of bankruptcy courts exist to adjudicate claims against a debtor and to control the disposition of property of the estate and are fundamentally *in rem* in nature. (App. 38a). Further, the court noted that Chubb's potential

"claims, like the vast majority of the Direct Actions, are not derivative of Manville's liability and do not seek to collect from [the Travelers Policies that were] the *res* of the Manville estate." (App. 37a).

In the context of this analysis, the Second Circuit revisited its prior jurisdictional ruling and "remain[ed] persuaded" that the 1986 Orders, as interpreted by the bankruptcy court to reach non-derivative claims against Travelers, "exceed[ed] the bounds of the bankruptcy court's *in rem* jurisdiction" over estate property by barring *in personam* claims against non-debtor Travelers. (App. 39a). Recognizing *Bailey's* holding that "parties who were present or represented in the proceedings that led to the entry of the 1986 Orders are barred from collaterally attacking the bankruptcy court's 2004 interpretation," the Second Circuit nevertheless concluded that, in evaluating Chubb's distinct due process challenge, its "analysis must take into account the *in personam* manner in which the 1986 Orders were interpreted by the bankruptcy court in 2004. Viewed from this perspective, the district court's reasoning unravels." (App. 40a).

The court emphasized that because the 1986 Orders, as interpreted, were not limited to the bankruptcy court's *in rem* jurisdiction over estate property, but also purported to act *in personam* to bar Chubb's independent contribution/indemnity claims against non-debtor Travelers, the *in rem* "exception" relied upon by the district court to "the principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process," was inapplicable to Chubb's potential

claims. (App. 41a, citations and internal quotation marks omitted).

> Thus, contrary to the district court's ruling, the bankruptcy court was not exercising its *in rem* power when it concluded that Chubb's claims were enjoined. Therefore, the "special remedial scheme" due process "exception" relating to *in rem* bankruptcy proceedings is insufficient to sustain the bankruptcy court's action as to Chubb.

(App. 43a).

Having rejected the district court's conclusion that due process to Chubb could be measured by the standards of bankruptcy's *in rem* "special remedial scheme," the Second Circuit likewise was "unpersuaded by the district court's conclusion that Chubb's due process rights were satisfied by the bankruptcy court's August 2, 1984 Notice of Hearing . . . ." (App. 43a). "Because the 1986 Orders purport to bind Chubb's *in personam* claims," the court continued, "the better due process analogy in terms of notice and representation principles is to class action settlements, not *in rem* bankruptcy proceedings." (*Id.*)

Relying upon this Court's decision in *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591 (1997), and its own precedent in *Stephenson* v. *Dow Chemical Co.*, 273 F.3d 249 (2d Cir. 2001), *aff'd in part by an equally divided court*, 539 U.S. 111 (2003), the Second Circuit did not "break any new ground" in concluding that "there can be little doubt that" Chubb received neither constitutionally sufficient notice nor constitutionally adequate representation in the proceedings leading up to the 1986 entry of the Insurance Injunction. (App. 49a).

> As to representation, there is no indication in the record that the sort of claims Chubb seeks to bring against Travelers were contemplated, much less accounted for, during the proceedings that led to the 1986 Orders. Neither Travelers nor the district court have suggested otherwise, and the terms of the bankruptcy court's August 14, 1984 Order appointing the FCR make this point plain. The bankruptcy court ordered the FCR to concern himself with "persons who have been exposed to" Manville's asbestos products and who may subsequently "manifest disease post-petition." Chubb does not fall within that category, and its interests relating to inchoate, non-derivative, post-petition claims against Travelers were not spoken for in those proceedings.
>
> We also conclude that the interests of the asbestos claimants who participated in the negotiations and hearings leading up to the 1986 Orders diverged from Chubb's future interests in a manner that precluded the claimants from adequately representing Chubb in those proceedings.

(App. 47a).

As for notice, the Second Circuit found that multiple deficiencies rendered notice inadequate as to Chubb. First, notwithstanding Chubb's supposed status as a "sophisticated insurer," the court found that Chubb could not have been expected to have the "prescience" to be able to discern from the bankruptcy court's 1984 notice "that the bankruptcy court would exceed its *in rem* jurisdiction in entering the 1986 Orders" much less to know "the factual extent of Travelers' relationship with Manville, which ulti-

mately served as the lynchpin of the bankruptcy court's 2004 interpretation of the 1986 Orders." (App. 49-50a).

Second, the court observed that even if the 1984 notice "could be interpreted to suggest that the 1984 Insurance Settlement Agreement would bar non-derivative claims against non-debtors, the parties publicly clarified their intentions by amending the agreement in a manner that indicated that Chubb was not an interested party in Manville's Chapter 11 proceedings," through the June 3, 1985 letter agreement that was incorporated into the bankruptcy court's September 26, 1985 provisional approval order. (App. 50a). Thereafter, "Chubb could not have known that it was an interested party in Manville's bankruptcy proceedings or that the 1986 Orders would bar its non-derivative *in personam* claims against Travelers." (App. 50-51a). Again relying upon *Amchem*, the Second Circuit held:

> even if Chubb received the Notice document, it could not have anticipated from the way the proceedings unfolded that its contribution and indemnity claims—which were abstract, "unimaginable," and inchoate at the time—would be enjoined. Therefore, it cannot be said that Chubb had constitutionally sufficient notice of the 1986 Orders, as interpreted by the bankruptcy court in 2004.

(App. 51a). Accordingly, as to Chubb alone, the Second Circuit reversed the district court's ruling.

REASONS FOR DENYING THE PETITIONS

I. THE SECOND CIRCUIT FAITHFULLY FULFILLED THE COURT'S MANDATE ON REMAND

In its Mandamus and Certiorari Petitions, Travelers accuses the Second Circuit of "violat[ing] this Court's mandate by reinstating the precise jurisdictional ruling that this Court reversed in *Bailey*." But that is not at all what the Second Circuit did. Moreover, Travelers' formulation of the Question Presented, and subsequent arguments, inaccurately portray this Court's holding in *Bailey*.

This Court did not disagree with the Second Circuit's conclusion that the bankruptcy court lacked subject matter jurisdiction in 1986 to enjoin non-derivative claims against Travelers. Rather, the Court's majority held that: (1) coupled with the bankruptcy court's 2004 finding that "Travelers learned virtually everything it knew about asbestos from its relationship with Manville" (App. 60-61a), the "unambiguous" language of the 1986 Insurance Injunction was broad enough to bar non-derivative claims against Travelers, and (2) *res judicata* barred parties to the 1986 proceedings "and those in privity with them" from attacking the 1986 Injunctions, which became final in 1988, on this or any other basis. (App. 71a). Notably, the two dissenting Justices who reached the jurisdictional issue agreed with the Second Circuit's holding. (App. 82-87a).

Further, this Court took care to emphasize the "narrow" scope of its holding, and that it was not "decid[ing] whether any particular respondent is bound by the 1986 Orders." (App. 74-75a). Indeed, the Court invited the Second Circuit to "take up" on

remand Chubb's contention "that it was not given constitutionally sufficient notice of the 1986 Orders, so that due process absolves it from following them, whatever their scope." (App. 75a). That is precisely what the Second Circuit did.

The Second Circuit obeyed all aspects of this Court's mandate, rejecting an attempt by the "Objecting Plaintiffs" to argue for the first time on remand that they were not adequately represented in the proceedings leading up to the 1986 Orders because this Court directed the Second Circuit only to consider properly preserved arguments. (App. 27a). Accordingly, as to every other appellant, the Second Circuit affirmed the district court's order, affirming, as modified, the bankruptcy court's "Clarifying" order.

The Second Circuit reversed the district court's order only as to Chubb, and did so on the very grounds that this Court invited it to "take up" on remand. It is true the Second Circuit revisited its prior jurisdictional holding, but that was in no sense an affront to this Court's authority. The Second Circuit was not entertaining another collateral attack by objecting asbestos claimants. Instead, that court's reaffirmation of its prior jurisdictional determination was undertaken in the distinct context of considering Chubb's due process objections—specifically, to evaluate the district court's ruling that the *in rem* nature of bankruptcy court proceedings excused compliance with otherwise applicable, "bedrock," due process requirements of adequate notice and representation. Surely, it was proper for the Second Circuit in evaluating this contention, which Travelers itself has pressed at all stages of this dispute, to determine whether the bankruptcy court in fact was acting

pursuant to its *in rem* subject matter jurisdiction over the Manville estate when it undertook in 1986 to discharge *non-derivative* present and future claims against non-debtor Travelers.

Put simply, the Second Circuit's renewal of its prior subject matter jurisdiction analysis solely in the context of evaluating Chubb's due process challenge in no sense violated this Court's mandate. To the contrary, it was part and parcel of that court's compliance with this Court's instructions on remand to consider Chubb's due process arguments.

II. TRAVELERS' ATTACKS ON THE SECOND CIRCUIT'S DECISION ARE WITHOUT MERIT

A. Chubb Is Not Bound by *Res Judicata* to Prior Rulings Regarding the Adequacy of Publication Notice

Travelers argues that Chubb is bound by the Second Circuit's holding in *MacArthur* that the notice of the insurance settlement proceedings was adequate as to MacArthur. But the Second Circuit rejected that argument because "Chubb was not a party to the 1986 proceedings and there is no indication in the record of a privity relationship between Chubb and any of the actual parties." (App. 33a). Moreover, Travelers' argument makes no sense in light of this Court's invitation to the Second Circuit—issued at the conclusion of an opinion about the *res judicata* effect of *MacArthur* on the Direct Action claimants—to "take up" on remand Chubb's due process arguments. If this Court had concluded that Chubb's due process argument was precluded by *MacArthur*, there would have been no reason for this Court to remand for consideration of this issue.

Travelers' circular argument assumes away the very issue under consideration, i.e., whether Chubb in fact was made a party to those proceedings such that its arguments are foreclosed by *res judicata*.

Indeed, it is well-settled that that the *res judicata* effect, if any, of a prior judgment upon any particular person, by definition, can be determined only in a subsequent proceeding. *See Hansberry* v. *Lee,* 311 U.S. 32, 40 (1940). "A court conducting an action cannot predetermine the *res judicata* effect of the judgment; that effect can be tested only in a subsequent action." *Matsushita Elec. Indus. Co., Ltd.* v. *Epstein*, 516 U.S. 367, 396 (1996) (Ginsburg, J., concurring in part and dissenting in part) (citations omitted). Thus, an absentee can collaterally attack the binding effect of a class action judgment on the basis of constitutionally insufficient notice. *See, e.g., Twigg* v. *Sears, Roebuck & Co.*, 153 F.3d 1222, 1226-29 (11th Cir. 1998). Likewise, a judgment may be collaterally attacked on grounds of constitutionally inadequate representation. *See, e.g., Gonzales* v. *Cassidy*, 474 F.2d 67, 74-75 (5th Cir. 1973).

B. Bankruptcy's "Special Remedial Scheme" Does Not Contemplate Enjoining Non-Derivative Claims Against a Non-Debtor

Travelers acknowledges (Cert. Pet. at 31) that due process's requirements must be evaluated "in light of the particular governmental interests at stake." Non-debtor Travelers, however, erroneously assumes that, in cutting off independent claims against Travelers, the process due to absent and future claimants somehow is lessened because these claims are being extinguished by an Article I bankruptcy

court in the context of the settlement of separate claims by the bankruptcy debtor against Travelers, as opposed to a Rule 23 class action before an Article III court. The Second Circuit correctly rejected this assertion.

To be sure, bankruptcy is an example of "a special remedial scheme" that, if "otherwise consistent with due process," "may terminate preexisting rights" thereby "expressly foreclosing successive litigation by nonlitigants." *Martin* v. *Wilks*, 490 U.S. 755, 762 n.2 (1989). But bankruptcy is about debtors. The central purpose of bankruptcy law is "to place the property of the bankrupt, wherever found, under the control of the court, for equal distribution among the creditors." *Straton* v. *New*, 283 U.S. 318, 320-21 (1931). The justification for this "special remedial scheme" is the practical necessity of promptly adjusting these competing claims, disposing of property of the estate free and clear of any pre-existing claims or interests, and, where appropriate, sending the honest but unfortunate debtor back out into the world with a fresh economic start.

Because non-debtors have not filed for bankruptcy, they are not subject to the strictures—and their creditors do not enjoy the protections—of the Bankruptcy Code, and a bankruptcy court's *in rem* jurisdiction does not extend to property of non-debtors, such as the independent claim of one non-debtor (Chubb) against another (Travelers). Likewise, the Bankruptcy Code does not contemplate the grant of a discharge to non-debtors. Indeed, even where a non-debtor is co-liable with the debtor on a debt, the Code makes clear that a discharge of the debtor "does not affect the liability of any other entity on . . . such debt." 11 U.S.C. § 524(e). Nor (except in the specific

provisions of Section 524(g)) does the Code grant any express authority to enjoin claims against non-debtors.

Plainly, the bankruptcy court acted beyond the scope of its authority when it undertook to enjoin current and future non-derivative claims against Travelers. As importantly, its actions were beyond the scope of the justification of practical necessity undergirding this "special remedial scheme." The Second Circuit therefore was perfectly correct to reject the district court's rationale for selling short Chubb's generally-applicable constitutional due process rights to adequate notice and representation.

C. Chubb Was Entitled to Adequate Representation, Even "in the Bankruptcy Context"

Notions of due process proceed on a basic premise that a plaintiff is the master of his claim and is entitled to his own day in court. *Ortiz,* 527 U.S. at 846. Exceptions to this rule are not lightly created nor expansively construed. Even where the law permits the rights of absent parties to be concluded, due process generally requires that the plaintiff be given notice and provided an opportunity to participate or, alternatively, opt out of, the representative litigation. *See Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985). Only in the narrowest of circumstances, when it is a practical necessity, have courts permitted the adjudication of the rights of absent or unknown plaintiffs without notice, a right to participate, or a right to opt out.

In those limited situations where notice and opt-out rights are unavailable, adequate representation becomes the paramount means of assuring due

process. "[T]he Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members." *Shutts*, 472 U.S. at 812. This is especially so when attempting to address the rights of future claimants given "the gravity of the question" of whether those "so unselfconscious and amorphous" could ever be given constitutionally-sufficient notice. *Amchem*, 521 U.S. at 628; *see also Ivy* v. *Diamond Shamrock Chems. Co. (In re Agent Orange Prod. Liab. Litig.)*, 996 F.2d 1425, 1435 (2d. Cir. 1993) ("providing individual notice and opt-out rights to persons who are unaware of an injury would probably do little good").

Central to Travelers' arguments is its contention that "in the bankruptcy context" publication notice is sufficient to bind an unrepresented future claimant, such as Chubb, to a non-debtor discharge of non-derivative claims without the benefit of virtual representation by an FCR. That is not the law, even "in the bankruptcy context."

Addressing future claims in bankruptcy, even against a debtor, is fraught with due process perils. Where it has been attempted, courts (and Congress in § 524(g)) have generally assumed that it is necessary to appoint a virtual representative for future claimants. Thus, the Third Circuit has held that due process prohibits the discharge of a future claimant's claim where "[n]o effort was made during the course of the bankruptcy proceeding to have a representative appointed to receive notice for and represent the interests of future claimants." *Jones* v. *Chemetron Corp.*, 212 F.3d 199, 210 (3d Cir. 2000); *accord Schwinn Cycling & Fitness* v. *Benonis (In re Schwinn Bicycle Co.)*, 210 B.R. 747 (Bankr. N.D. Ill. 1997) (future claimant's state-law successor liability action against

asset purchaser not barred by § 363 "free and clear" sale order where no FCR appointed and no provision made to pay future claims). Indeed, in *Mullane*, the petitioner was himself the "special guardian and attorney for all persons known or unknown not otherwise appearing who had or might thereafter have any interest in the income of the common trust"—i.e., a virtual representative for absent and future claimants in an *in rem* proceeding. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 310 (1950).

The bankruptcy court recognized these problems and appointed an FCR to represent future personal injury claimants against Manville. As the Second Circuit correctly concluded, however, the FCR did not represent the interests of Chubb. Indeed, even while arguing for an *in rem* due process "exception," Travelers concedes (Cert. Pet. at 27) that due process rights do not "vary depending on whether actions are *in rem* or *in personam*." Either way, therefore, future claimant Chubb was entitled to adequate representation, which it was denied because the FCR did not represent Chubb's interest in the 1980s.

D. Constitutionally Sufficient Notice of the 1986 Orders Was Never Directed Toward Chubb

Even if compliance with the virtual representation prong of due process could be excused, and even if it had been possible to give constitutionally-adequate notice to future claimant Chubb in 1986, Chubb still could not have been bound *in personam* to the 1986 Orders because, as the Second Circuit concluded, constitutionally adequate notice was neither attempted nor accomplished.

Consistent with the fact that Manville never intended to seek or obtain an injunction of claims against Travelers that were not derivative of the Policies that were estate property, Manville never sought to direct notice to those who might hold independent claims against Travelers. Instead, Manville's 1984 publication notice was only addressed to Manville's own "CREDITORS, CLAIMANTS, EQUITY SECURITY HOLDERS AND INTERESTED PARTIES." (SA-38). Chubb was not a Manville creditor, claimant, or interested security holder, and had no involvement in Manville's litigation with Travelers.

In arguing that the 1984 publication notice directed toward Manville claimants satisfied due process as to Chubb, Travelers erroneously refers to Chubb as an "interested party" in the Manville bankruptcy. The term "party in interest" generally denotes the statutorily-contemplated participants in the bankruptcy process. *See* 11 U.S.C. § 1109(b). While the term has some flexibility, *see, e.g.*, *In re Amatex Corp.*, 755 F.2d 1034, 1041-43 (3d Cir. 1985) (future asbestos claimants against a debtor are "parties in interest" deserving of virtual representation because they have a sufficient "practical stake" in the outcome of an asbestos-driven bankruptcy), non-creditor, non-Manville insurer Chubb would not reasonably have understood that this notice was directed towards it.

Travelers further argues that because Chubb was a "sophisticated insurer," Chubb must be presumed to have received actual notice of the settlement approval proceedings. But Travelers' proffered "sophisticated insurer" exception to due process is as unsustainable as it is ironic. To satisfy due process, "notice must be the best practicable, 'reasonably

calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' . . . The notice should describe the action and the [absent parties'] rights in it." *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 811 (1985) (quoting *Mullane*, 339 U.S. at 314-15). The notice must be "such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Mullane* 339 U.S. at 315.

Given Travelers' concession that "Direct Action" claims were "unimaginable" in the 1980s, Chubb could not have been given meaningful notice that its rights were being affected. Moreover, sophisticated or not, Chubb was not a creditor or an insurer of Manville. Thus, even were Chubb generally aware that the Manville bankruptcy case existed, given the purposes and limitations of bankruptcy, Chubb could have had no reason to believe that the Manville bankruptcy proceedings would in any way affect Chubb or Chubb's rights against any non-debtor, including Travelers. Since no attempt was made to notify entities such as Chubb—much less to advise how their rights were at stake in the settlement hearing—it simply cannot be said that the 1984 notice was "reasonably calculated" to apprise Chubb that its rights were in jeopardy, much less the "best practicable" notice, or even notice of the sort that someone "desirous of actually informing the absentee" would have utilized.

Furthermore, Travelers completely ignores the impact of the bankruptcy court's September 26, 1985 order on the due process analysis. That order expressly incorporated the June 3, 1985 letter agreement amending the Travelers settlement to

clearly disavow any intention to obtain an injunction barring non-derivative claims against Travelers. The bankruptcy court thus assured everyone that any injunction would only implicate claims against the policies, the *res* of Manville's estate. The remaining issue to be resolved at a later date—the adequacy of the consideration Travelers was to pay Manville—was of no concern to Chubb.

If the bankruptcy court intended thereafter to enter an injunction enjoining non-derivative claims, it would have had to provide Chubb anew with constitutionally adequate notice specifically advising Chubb of this change in circumstances and giving Chubb an opportunity to be heard anew. But Travelers does not, and cannot, claim that any of the additional notices published in 1986 was either directed toward Chubb or was intended to notify Chubb that the court intended to enter an order barring current and future independent claims against Travelers.

Thus, (1) Chubb was in the position of an unrepresented future claimant in 1984-86; (2) Manville and Travelers never attempted to give constitutionally sufficient notice to Chubb; and (3) the bankruptcy court's September 26, 1985 order provided assurance that any order approving the Travelers settlement would not enjoin any entity's right to assert non-derivative claims against Travelers. Plainly, the Second Circuit was correct to conclude that Chubb was not a party to the bankruptcy proceedings because it was not "given a fair chance to challenge the Bankruptcy Court's subject matter jurisdiction," and is therefore free to "challenge it now by resisting enforcement of the 1986 Orders" as to Chubb. (App. 72a).

III. THIS CASE IS NOT AN APPROPRIATE VEHICLE TO RESOLVE THE CIRCUIT SPLIT AS TO THE POWER OR JURISDICTION OF BANKRUPTCY COURTS TO PROVIDE NON-CONSENSUAL RELEASES TO NON-DEBTORS

At the heart of Travelers' arguments is its contention that Chubb's due process rights must be measured by the standards of bankruptcy's "special remedial scheme" rather than the general principle "that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." That argument, in turn, would require this Court to address questions it avoided in *Bailey*, i.e., whether, under the Bankruptcy Code, or more fundamentally, the Constitution's bankruptcy power, "a bankruptcy court, in 1986 or today, could properly enjoin claims against nondebtor[s] . . . that are not derivative of the debtor's wrongdoing," and whether the provisions for retroactive validity of an asbestos channeling injunction under 11 U.S.C. § 524(h) are satisfied by the Insurance Injunction. (App. 75a n.9).

This case, however, does not present an appropriate vehicle for addressing such issues—indeed, these issues are not properly presented here at all. First, as demonstrated above, there is, in fact, no "exception" in bankruptcy to compliance with the constitutional due process requirements of adequate notice and representation. Thus, whether or not third party releases are permitted, they are not enforceable against those who have not received constitutionally adequate notice and/or representation.

Further, there is no circuit split over whether a bankruptcy court has authority to enjoin non-

derivative claims against a non-debtor. Indeed, the Second Circuit relied heavily in its opinions upon the Third Circuit's opinion in *In re Combustion Eng'g, Inc.*, 391 F.3d 190 (3d Cir. 2004), which held that even § 524(g) did not authorize enjoining non-derivative claims against non-debtors. Two courts of appeals have concluded that such injunctions are impermissible under any circumstances. *See In re Lowenschuss*, 67 F.3d 1394, 1401-02 (9th Cir. 1995); *In re Western Real Estate Fund*, 922 F.2d 592, 601-02 (10th Cir. 1991). Even those circuits that have permitted non-debtor releases/injunctions have done so only in the most "unusual circumstances." *See In re Dow Corning Corp.*, 280 F.3d 648, 658 (6th Cir. 2002). Such an injunction, the Sixth Circuit held, is permissible only when seven factors are satisfied. Specifically, among other factors, there must be "an identity of interests between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate," and the injunction must be "essential to the reorganization" because the reorganization "hinges on the debtor being free" from such indemnity or contribution claims. *Id.* The Sixth Circuit further required that the plan provide "a mechanism to pay for all, or substantially all, of the class or classes affected by the injunction" as well as "an opportunity for those claimants who choose not to settle to recover in full." *Id.*

The 1986 Insurance Injunction here goes far beyond the bounds of any non-debtor release upheld by any circuit, as this case involves a release of claims that are entirely independent of any alleged liability of Manville and arises under most unusual procedural and factual circumstances. Moreover, as

interpreted by the bankruptcy court in 2004, the Insurance Injunction gave Travelers a broader release than even Manville could have obtained from the bankruptcy court because it gave Travelers immunity from suit for its allegedly tortious, post-confirmation activity after 1986 so long as that activity was based upon "knowledge" about asbestos that Travelers learned from its insurance "relationship" with Manville. Further, unlike the other cases, no provision was made to compensate Chubb for the confiscation of its potential claims against Travelers. This Court accordingly should await an appropriate case to address these issues.

IV. ADDITIONAL GROUNDS, NOT REACHED BY THE SECOND CIRCUIT, WOULD REQUIRE THAT THE CLARIFYING ORDER BE VACATED AS TO CHUBB

A. The Bankruptcy Court Lacked Subject Matter Jurisdiction to Attempt to Bind Chubb to the 2004 "Clarifying Order"

As this Court noted, the bankruptcy court's sole source of jurisdiction in 2004 was its authority to interpret and enforce the 1986 Injunctions. (App. 70a). By definition, however, this remnant enforcement power can only be exercised over the Direct Action claimants and their lawyers who allegedly violated the Insurance Injunction by suing Travelers. Chubb was not even alleged to be violating the 1986 Injunctions. The bankruptcy court therefore had no authority to hale Chubb before it, nor to "clarify" the rights of anyone other than the alleged violators.

B. The Bankruptcy Court Lacked Procedural Authority to Purport to Bind Chubb to Its 2004 "Clarifying Order"

Finally, the Clarifying Order is procedurally impermissible to the extent it purports to bind Chubb. Travelers' attempt to obtain equitable relief constitutes an "Adversary Proceeding" under Fed. R. Bankr. P. 7001, to which Fed. R. Civ. P. 23 applies through Bankruptcy Rule 7023. Clearly, the Common Law Direct Action Settlement is a class settlement intended to bind absentees (and future claimants) without compliance with Rule 23.

Among Rule 23's protections that were denied to Chubb was any effort to ensure that the procedural requisites of class treatment, which themselves are critical to due process, were satisfied. For example, the Direct Action plaintiffs and their counsel (many of whom were simultaneously suing Chubb) did not adequately protect the interests of absentees such as Chubb. The fundamental unfairness of attempting to bind Chubb to these dubious proceedings is manifest. The Direct Action claimants and their counsel had an enormous financial incentive to cooperate in getting the bankruptcy court to adopt whatever findings and conclusions Travelers desired. Furthermore, Chubb was not given notice of its right, nor was it permitted, to exclude itself from the class. Independent of the lack of subject matter jurisdiction, such mandatory, no opt-out class actions are flatly prohibited by *Amchem* and *Ortiz*.

Chubb cannot be bound jurisdictionally or procedurally to the 2004 settlement-approval proceedings that led to the issuance of the "Clarifying" order. Chubb has never been accused of violating in 1986 Injunctions, and should Travelers ever accuse Chubb

of violating the 1986 Injunctions, Chubb will be constitutionally and procedurally entitled to its own day in court. Because there is no way that Chubb could have properly been made a party to the 2004 proceedings, Chubb is in no way bound to the record that was made or to the findings and conclusions of the bankruptcy court.

CONCLUSION

The petitions should be denied.

Respectfully submitted,

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